DOCKET

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Status: GRANTED

Title: Air France, Petitioner
v.
Valerie Hermien Saks

Docketed:
April 30, 1984

Court: United States Court of Appeals
for the Ninth Circuit

See also:
84-939

Counsel for petitioner: Minch, Lawrence N.

Counsel for respondent: Smith, Daniel U.

Entry	Date	Note	Proceedings and Orders
1	Apr 30 1984	G	Petition for writ of certiorari filed.
2	Jun 13 1984		DISTRIBUTED. September 24, 1984
4	Jun 12 1984		Order extending time to file response to petition unti June 22, 1984.
5	Jun 22 1984	X	Brief of respondent Saks, Valerie H. in opposition filed.
6	Aug 29 1984	X	Reply brief of petitioner Air France filed.
8	Sep 25 1984		Supplemental brief of petitioner Air France filed.
9	Oct 1 1984		Petition GRANTED. The Solicitor General is invited to file a brief in this case expressing the views of the United States.
			**********
10	Nov 15 1984	G	Motion of International Air Transport Association for leave to file a brief as amicus curiae filed.
11	Nov 15 1984	G	Motion of The Republic of France for leave to file a brief as amicus curiae filed.
12	Nov 15 1984		Brief of petitioner Air France filed.
13	Nov 15 1984		Joint appendix filed.
14	Nov 20 1984		Brief amicus curiae of United States filed.
16	Nov 27 1984	G	Motion of The Republic of France for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Dec 3 1984		Motion of International Air Transport Association for leave to file a brief as amicus curiae GRANTED.
18	Dec 3 1984		Motion of The Republic of France for leave to file a brief as amicus curiae GRANTED.
19	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 15, 1985. (1st case
20	Dec 10 1984		CIRCULATED.
21	Dec 15 1984	X	Brief of respondent Saks, Valerie H. filed.
22	Dec 17 1984		Record filed.
23	Dec 28 1984		Record filed.
24	Jan 7 1985		Motion of The Republic of France for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Dec 28 1984		Record filed.
26	Jan 7 1985	X	Reply brief of petitioner Air France filed.
27	Jan 15 1985		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

(1)

83-1785

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the decision below, admittedly in direct conflict with the Third Circuit, incorrectly rule that the Warsaw Convention imposes liability upon international airlines for events which are neither unusual nor unexpected, such as the routine, necessary repressurization of an aircraft cabin?

2. Did the decision below abrogate a treaty provision by permitting a passenger to maintain an action against a carrier for illness or injury occurring on board an aircraft without first satisfying the Warsaw Convention's threshold requirement of showing that an accident occurred?

3. Did the Montreal Agreement, a private agreement among international airlines, modify the Warsaw Convention to make international carriers the insurers of their passengers against any illness or injury occurring in the course of aircraft operations?

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

VS.

VALERIE HERMIEN SAKS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Air France[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on January 31, 1984, which reversed and remanded a final judgment of the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the court of appeals, reported at 724 F.2d 1383, 18 Av. Cas. (CCH) 17,606 (9th Cir. 1984), is reprinted in the appendix hereto at 1a. The order of the district court, which is unreported, is reprinted at 16a.

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[1]In response to Rule 28.1, Petitioner Air France states that it has the following subsidiaries: Air Charter, Jet Chandler International, Societe Des Hotels Meridien, Servair, Societe Immobiliere Aeroportuaire (SIA), Sodetaire, Sotaire, Tourisme France International.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 31, 1984. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY INVOLVED

This case concerns the construction and purpose of the Warsaw Convention, *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 note, in particular, article 17 thereof. Article 17 and other related provisions of the Convention are set out at pages 20a-23a of the appendix.

STATEMENT OF THE CASE

Respondent Valerie Hermien Saks, a passenger on an Air France flight from Paris to Los Angeles, brought an action for damages, alleging a total loss of hearing in one ear as a result of cabin pressurization changes. In response to Air France's motion for summary judgment, she conceded that the cabin pressurization system functioned normally in all respects. CR at 12; *see* app. 16a. Her action was dismissed because she could not show that an "accident" had occurred within the meaning of article 17 of the Warsaw Convention. App. 17a. The court below reversed because it found that the Montreal Agreement, a private agreement of international air carriers serving the United States, modified the Convention to make the carriers' liability "absolute" for injuries occurring on board aircraft. App. 7a, 724 F.2d at 1386.

The Warsaw Convention. — The Convention is a multilateral treaty governing international aviation to which more than 120 nations, including the United States and

France, now adhere. Its significance to international aviation as well as its importance within the multilateral treaty system is beyond dispute. The Convention's primary purposes are to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *See Trans World Airlines v. Franklin Mint Corp.*, ____ U.S. ____, 52 U.S.L.W. 4445, 4446 (April 17, 1984).[2]

The Convention limits carrier liability in two ways. First, it imposes ceilings on carrier liability for property loss and personal injury damages. *See* article 22, *reprinted at* 21a. Second, it adopts uniform preconditions for carrier liability. *See* articles 17-21, *reprinted at* 20a-21a.

Recently, in *Trans World Airlines v. Franklin Mint Corp.*, the Court overturned a decision of the Second Circuit which, ostensibly acting on grounds of public policy, had abrogated the Convention's liability ceiling. The matter now before the Court concerns a decision in which the Ninth Circuit, also reputedly acting on policy grounds and admittedly in direct conflict with the Third Circuit, has in effect abolished the fundamental precondition for carrier liability for personal injury—the requirement that an "accident" be shown to have occurred.

This controversy focuses upon the proper construction of article 17 of the Convention. Article 17 creates a presumption of carrier liability for passenger injury "if the

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[2] *See also* In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982); Reed v. Wiser, 555 F.2d 1079, 1089-90 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1978), Block v. Compagnie Nationale Air France, 386 F.2d 323, 327 (5th Cir.), *cert. denied*, 392 U.S. 905 (1967); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967).

accident which caused the damage so sustained took place on board the aircraft.'"[3] The carrier can be relieved of liability by showing that it had "taken all necessary measures to avoid the damage" or that it was impossible to do so. Article 20(1), *reprinted* at 21a.[4] The Convention also permits a defense of contributory negligence. Article 21 *reprinted* at 21a. The decision below has broken with previous authority by construing the term "accident" in article 17 as any "occurrence associated with the operation of an aircraft." App. 3a-4a, 724 F.2d at 1385.

The Montreal Agreement. — On November 15, 1965, the United States gave notice of denunciation of the Convention because of dissatisfaction with the Convention's low limits of liability for personal injury or death to passengers. 31 Fed. Reg. 7302 (1966) *reprinted at* 27a. At a subsequent international conference in Montreal, revisions to the Convention were discussed but no agreement reached. To avoid U.S. withdrawal from the Warsaw system, the major international carriers, at the behest of the State Department, entered into a voluntary arrangement increasing their liability limits for flights serving the United

[3]*See* Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 4 (1934) (letter from Secretary of State Cordell Hull transmitting the Convention to the Senate for adherence) *quoted in* Lowenfeld & Mendelsohn, 80 Harv. L. Rev. at 500.

[4]The drafting history of article 20 makes clear that it was intended to embody the common law concept of "due diligence" or "due care". G. Miller, *Liability in International Air Transport* 66-67 (1977).

States. This arrangement became known as the "Montreal Agreement".[5]

Article 22(1) of the Convention originally placed a ceiling on carrier liability for personal injury or death of approximately $8,300 per passenger, but permits this ceiling to be raised by "special contract" between the carrier and the passenger. In the Montreal Agreement, the parties agree to include within their conditions of carriage and tariffs a provision, constituting a "special contract" in accordance with article 22(1), raising the liability limit to $75,000 on international flights serving any point in the United States. App. 24a. The parties further agree to include a provision waiving the right to assert the due care defense of article 20(1) in personal injury actions to which the Convention applies. *Id.* The contributory negligence defense of article 21 is left intact.[6]

The Montreal Agreement is a private contract, not a treaty. It modifies the Convention only as the terms of the Convention permit it to be modified and only in accordance with the contracting carriers' intent. The Montreal Agreement does not purport to change the scope of the Conven-

[5]The Montreal Agreement was filed with and approved by the Civil Aeronautic Board pursuant to section 412 of the Federal Aviation Act of 1958, 42 U.S.C. § 1382. *See* 31 Fed. Reg. 7302 (1966). Petitioner Air France was one of the original parties, who then carried collectively well over 90 percent of all international air traffic involving U.S. points. 54 Dep't State Bull. 955, 956 (1966). More and more carriers have executed counterparts over the years. At present there are approximately 200 signators. 1 Speiser & Krause, *Aviation Tort Law*, § 11.19 at 676-78 n.27 (1978).

[6]Day v. Trans World Airlines, 528 F.2d 31, 32 n.3 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); Mathias v. Pan-American World Airways, 53 F.R.D. 447, 449 n.4 (W.D.Pa. 1971).

tion's application, nor was it intended to in any way alter the meaning of article 17.[7]

The proceedings below. — This action commenced in state court and was properly removed to federal court.[8] When respondent could develop no evidence of malfunction in the aircraft's cabin pressurization system nor of any unusual event to account for her alleged permanent hearing loss, Air France moved for summary judgment.[9]

Relying on *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), and *Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977), the court concluded that an ear injury caused by normal cabin pressurization changes does not constitute an "accident" covered by the Convention. App. 17a. Accordingly, Air France's motion for summary judgment was granted. *Id.* at 18a.

The Ninth Circuit reversed. It expressly rejected the analysis and conclusions of the Third Circuit on the issue as "out of step" with the Montreal Agreement and imposed "absolute liability on airlines for injuries caused by air travel." App. 10a, 724 F.2d at 1388. It held that "a showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention." App. 2a, 724 F.2d at 1384. Judge Wallace dissented because his analysis of the Convention and Montreal

[7] *See* MacDonald v. Air Canada, 439 F.2d 1402, 1405n. (1st Cir. 1971); In re Tel Aviv, 405 F.Supp. 154, 155 n.2 (D.P.R. 1975), *aff'd sub nom.* Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[8] Air France is an agency or instrumentality of a foreign state. *See* 28 U.S.C. §§ 1441(d), 1603.

[9] Air France produced documents and an affidavit from the aircraft commander establishing that the flight was normal in all relevant respects. *See* CR at 7-11w. The programmed pressurization changes are necessary to the safety of passengers.

Agreement was in accord with the Third Circuit's, and because the majority had ignored the substantial interest in uniform interpretation of treaties.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict among the circuits crucial to the scope and application of the Warsaw Convention. The conflict among the circuits involves an important question affecting all international air transportation. The Ninth Circuit decision abrogates a fundamental provision of the Convention establishing a precondition for carrier liability in cases of death or personal injury. The novel construction of the term "accident" in article 17 of the Warsaw Convention adopted by the Ninth Circuit makes air carriers the insurers of their passengers against any illness or injury occurring in the course of aircraft operations. This construction is not supported by any precedent, by the Convention's language, or by the Convention's subsequent history. It seriously undermines the uniformity in international law that the Convention was designed to achieve.

I.

THE DECISION BELOW CREATES A CLEAR CONFLICT AMONG THE CIRCUITS ON THE PROPER CONSTRUCTION OF THE WARSAW CONVENTION'S FUNDAMENTAL LIABILITY PROVISION

A. The Majority Opinion Below Is Admittedly in Direct Conflict with the Third Circuit's Decision in DeMarines

The decision below is squarely in conflict with the Third Circuit's decision in *DeMarines v. KLM Royal Dutch Airlines*. Although both courts state that an "accident" which proximately causes an injury is a condition precedent to

the applicability of the Warsaw Convention's liability rules,[10] the decision of the Ninth Circuit effectively concludes that any injury which is not self-inflicted constitutes an "accident" for Convention purposes. The Third Circuit recognizes that article 17 requires an independent two-step inquiry: (a) did an accident occur, and (b) did it cause plaintiff's injury? *See* 580 F.2d at 1196. The decision below telescopes that two-step inquiry and imposes liability simply on the basis of causation.

DeMarines was also a personal injury action against an airline for a hearing loss allegedly resulting from cabin pressurization changes on an international flight. The court approved as properly stating the law a jury instruction defining an article 17 "accident" as follows:

> An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening. [580 F.2d at 1196.][11]

Recognizing that this definition requires a showing of more than normal pressurization changes, the court said: "Absent testimony indicating that the plane's cabin pressure change was the result of some 'unusual or unexpected happening', we have grave doubts that a finding that an

[10]*See* app. 3a, 724 F.2d at 1385; *compare* 580 F.2d at 1196.

[11]The court strongly endorsed this instruction stating: "This definition of accident, which is in accord with our own reading of the relevant case law, properly presented the jury with the correct legal standard for determining the occurrence of an accident." *Id.* at 1197.

accident occurred in this case is legally supportable." *Id.* at 1197-98. Accordingly, *DeMarines* reversed a jury verdict for plaintiff and remanded with instructions. *Id.* at 1203.[12]

The Ninth Circuit majority mischaracterizes the decisions from the Third Circuit as "applying a restrictive negligence-based definition of 'accident' to injuries involving the effect of depressurization on passenger hearing" and so dismisses them as "out of step" with the Montreal Agreement, in which the carriers waived the "due care" defense. App. 10a, 724 F.2d at 1388. The Court below found comfort in language of certain recent decisions construing the Montreal Agreement and Warsaw Convention, but ignored that all those cases involved some unusual and unanticipated event as the proximate cause of the injury. It is the lack of such an event, not due care or the absence of carrier fault, on which the Third Circuit decisions turn. As the dissent below succinctly states:

> The Third Circuit's definition has nothing to do with negligence or the lack of it, so it would not undermine a proper concern for the elimination of the "due care" defenses accomplished by the Montreal Agreement .... If an unusual change in air pressure occurred, it would fit the requirement of an accident under the Conven-

[12]The Third Circuit found persuasive the reasoning in Warshaw v. Trans World Airlines, 442 F. Supp. 400 (E.D. Pa. 1977), decided after trial in *DeMarines*, where the court, sitting without a jury, granted judgment for the carrier on substantially identical facts. *See* 580 F.2d at 1197. Warshaw held that

> routine repressurization of the cabin of a jet aircraft as it descends from a high altitude to land, when accomplished in the normal and usual fashion without any complications or external disruptions, and in accordance with the customarily anticipated preplanned mode, is not an accident under the provisions of Article 17 of the Warsaw Convention, as modified by the Montreal Agreement. [442 F. Supp. at 407.]

> tion and [the plaintiff] could recover by operation of the Montreal Agreement whether or not Air France were at fault for, or had taken all due care to prevent, the unusual change. [App. 12a, 724 F.2d at 1389.]

"[T]here is a substantial interest in uniform interpretation of treaties such as the Convention." App. 14a, 724 F.2d at 1389.[11] Notwithstanding this interest, the majority opinion below has deliberately created a conflict.

B. The Decision Below Also Conflicts With Decisions of Other Circuits Confirming That an "Accident" is an Independent Prerequisite for Application of Article 17

The Third Circuit's decision follows other circuits' construction of article 17. Precedent from the First and Second Circuits, as well as the Third, rejects the notion that the Convention makes the carrier liable for every illness or injury in any way associated with aircraft operations and establishes that there are two independent requirements for the applicability of article 17: (1) there must be an accident within the contemplation of article 17, and (2) the passenger's injury must have been proximately caused by the accident. *See MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 706 (S.D.N.Y.), *aff'd mem.*, 485 F.2d 1240 (2d Cir. 1972).[12]

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[11]*See* Benjamins v. British European Airways, 572 F.2d 913, 917 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Evangelinos v. Trans World Airlines, 550 F.2d 152, 155 (3d Cir. 1977); Block v. Compagnie Nationale Air France, 386 F.2d at 338.

[12]*See also* Abramson v. Japan Airlines, 18 Av. Cas. (CCH) 17,512 (S.D.N.Y. 1983); Morris v. Boeing Co., 15 Av. Cas. (CCH) 17,241, 17,242 (S.D.N.Y. 1978); Mathias v. Pan-American World Airways, 53 F.R.D. at 449-50.

In all prior decisions in which an "accident" has been found for purposes of article 17, "the common thread has been a happening or event which in each case was beyond the normal and preferred mode of operation for the flight," in most cases, "an 'out-of-the-ordinary', unanticipated incident." *Warshaw*, 442 F. Supp. at 410. Thus, article 17 has been held applicable to passenger injury resulting from skyjacking[13] and terrorist acts.[14] While these opinions do take a broad view of the term "accident", they do not, as the opinion below suggests, make international carriers liable for any and all "risks of the air". *See* app. 2a, 10a; 724 F.2d at 1384, 1388. Rather, each of these cases acknowledges that "[t]o invoke the Convention, there must be an 'accident' within the contemplation of article 17, and the burden of proof is upon the plaintiff to establish that such an accident occurred." *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. at 706.

Other courts in cases similar to this one have adopted the view articulated by the Third Circuit of what constitutes an accident under the Convention and denied carrier liability. In *Abramson v. Japan Airlines*, the court applied the *DeMarines* definition of accident and held that an airline was not liable for aggravation of a passenger's hernia condition which occurred in flight. Similarly, where a plaintiff suffering a thrombophlebitis attack in flight could not show either a collision, turbulence or other abnormality in the plane's operation, the court found as a matter of law that

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[13]Husserl v. Swiss Air Transport Co., 351 F. Supp. at 707.

[14]Evangelinos v. Trans World Airlines, 550 F.2d at 154; Day v. Trans World Airlines, 528 F.2d at 33.

there had been no accident within the meaning of article 17. *Scherer v. Pan American World Airways*, 14 Av. Cas. (CCH) 17,410, 17,411 (N.Y. App.Div. 1976).[17]

The ruling of the court below that the Convention imposes "absolute liability for injuries proximately caused by the risks inherent in air travel" (App. 2a, 724 F.2d at 1384) finds an "accident" from the fact of an injury. In so ruling, the Ninth Circuit creates a conflict with all previous authority on point and converts carriers into insurers of their passengers' health.

II.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION BECAUSE IT ABROGATES A TREATY PROVISION AND FUNDAMENTALLY CHANGES THE LIABILITY OF ALL INTERNATIONAL AIR CARRIERS SERVING THE UNITED STATES

If allowed to stand, the decision below will have a substantial impact on all of international aviation. The decision fundamentally changes the Warsaw Convention system of liability from one of accident compensation to one of travel insurance in a manner contrary to the understanding of the contracting nations. On the basis of its own notions of social policy, the court below has ruled that a private agreement abrogates a treaty provision. The Ninth Circuit's departure

[17]Other decisions have followed *DeMarines'* and *Warshaw's* definition of accident, ruling that article 17 does not apply absent a showing of "an unexpected and sudden event that takes place without foresight," Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283, 18,284 (D.Md. 1983), *quoting DeMarines*, 433 F. Supp. 1047, 1052 (E.D. Pa. 1977), or that the "flight in question was not 'accomplished in the normal and usual fashion without any complication or external disruption,'" Weintraub v. Capitol International Airways, 16 Av. Cas. (CCH) 18,058, 18,059 (N.Y. App. Div. 1981), *citing Warshaw*.

from the Third Circuit's test creates a new class of Warsaw Convention claims never intended by the over 120 nations adhering to the Convention or the more than 200 air carriers subscribing to the Montreal Agreement. This new class of claims, based upon normal and routine aircraft operations, will be difficult to adjudicate because they will turn far more upon passengers' subjective claims of causation without the objective and independent requirement of showing that an accident occurred.

The opinion below employs the vague notion of "absolute liability" to effect a radical transformation of the Convention's liability system. App. 7a, 724 F.2d at 1386. Although it has been stated[18] that liability under the Convention is "absolute" as a result of the contractual waivers agreed to by the carriers at Montreal, the proposition has nowhere been explained.[19] This important question of the scope of Warsaw Convention liability for passenger injury has not been, and should be, addressed by this Court.

The Ninth Circuit's construction of article 17 contradicts the draftsmen's intent. The Warsaw Convention established a liability system based upon the fault of the carrier in causing passenger injury, not on the allocation of risks, as the opinion below acknowledges. App. 5a, 724 F.2d at

[18]*See, e.g.* In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d at 1305; Evangelinos v. Trans World Airlines, 550 F.2d at 154; Day v. Trans World Airlines, 528 F.2d at 32-33. As discussed previously, even those decisions which state that carrier liability is "absolute" have never held that liability exists where there has been no unusual or unexpected occurrence in the course of aircraft operations.

[19]Indeed, even a regime of strict liability (which the Warsaw Convention is not) must have some limitations on its scope. *See* W. Prosser, *Law of Torts* § 79 at 517 (4th ed. 1971) (where strict liability applies, "the defendant's duty to insure safety extends only to certain consequences").

1385.[20] The Montreal Agreement raised the liability ceiling and removed a possible affirmative defense, but did not otherwise change the Convention's liability system.[21]

The proper starting point in determining what injuries are compensable under the Warsaw system is the language of the Convention itself. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). Article 17, which governs harm to passengers, extends liability only to *accidents* injuring people. In contrast, where checked baggage is damaged, the carrier is liable "if the *occurrence* which caused the damage took place during the transportation by air." Article 18 (emphasis supplied). *See* App. 11a, 724 F.2d at 1388. Inexplicably, the majority opinion below ignores this distinction drawn by the Convention, looking instead to unrelated sources for a definition, and decides that "accident" means "occurrence". *See* App. 3a, 724 F.2d at 1385.

The subsequent history of the Convention clearly demonstrates that the Ninth Circuit's definition is contrary to the understanding of the treaty nations.[22] "In ascertaining

[20]*See* G. Miller, *Liability in International Air Transport* 63 (1977); 1 Shawcross & Beaumont, *Air Law* VII(2) (4th ed. 1984).

[21]*See* MacDonald v. Air Canada, 439 F.2d at 1405n.; In re Tel Aviv, 405 F.Supp. at 155 n.2.

[22]An amendment to article 17 negotiated at a conference in Guatemala City in 1971, but never adhered to by the United States or entered into force, shows the importance of the distinction between "accident" and "occurrence". The Guatemala Protocol would have substituted the phrase "the *events* which caused the death or injury" for the phrase "the *accident* which caused the damage so sustained" in article 17. R. Mankiewicz, *Warsaw Convention: the 1971 Protocol of Guatemala City*, 20 Am. J. Comp. L. 335, 337 (1972) (emphasis supplied). The due care defense of article 20(1) was at the same time eliminated in the case of passenger injury.

the meaning of a treaty [the Court] may look beyond its written words to . . . [the contracting parties'] own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); *see* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), *reprinted at* 63 Am. J. Int'l L. 875 (1969).

The Montreal Agreement is a private agreement among air carriers, not a protocol amending the Convention. The waiver of the due care defense by the carriers party to the Montreal Agreement removes entirely the issue of carrier negligence from personal injury claims arising from accidents on board aircraft serving U.S. international routes. Hence, the Montreal Agreement has been said to impose "absolute liability." Yet the agreement "does not change the substance of the liability—i.e., the character of the compensable injuries—as it is provided in article 17 of the Convention."[23]

Nothing in the Montreal Agreement or its history evinces an intent to expand the class of potentially compensable injuries or to make carriers insurers against all the "risks of the air." The Montreal Agreement *"contains none of the basic elements of an insurance contract.* It is exactly what it purports to be, a *waiver of certain defenses* in return for

The purpose of these changes was to provide strict liability for passenger injury, qualified only by an express exception regarding the passenger's preexisting state of health. *Id.* at 337-38. That the draftsmen considered these changes necessary in order to transform the Convention's fault-based liability system into a system of strict liability demonstrates the significance of an "accident" as an independent condition of liability under the existing scheme. *See also Warshaw*, 442 F.Supp. at 410-12 (reviewing the Guatemala negotiations).

[23]Rosman v. Trans World Airlines, 13 Av. Cas. (CCH) 17,231, 17,232 (N.Y. Ct. App. 1974).

a limitation of liability *in event of an action alleging a breach of duty* and damages therefrom." *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E. 2d 367, 372, *cert. denied*, 409 U.S. 878 (1972) (emphasis supplied).

The decision below falsely suggests that the Montreal Agreement modifies the Warsaw Convention to create a cause of action in tort imposing "absolute liability for injuries proximately caused by the risks inherent in air travel." App. 2a; 724 F.2d at 1384.[*] It justifies this conclusion on policy grounds concerning risk allocation. *Id.* at 7a-8a; 724 F.2d at 1386-87. The court thus ascribes to the Montreal Agreement legal consequences that a private agreement could not possibly have and effectively abrogates a treaty.

The duty of the courts is "to interpret [a treaty] and administer it according to its terms." *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854). Courts "do not sit to decide whether laws are no longer necessary or to assess the diplomatic consequences of their abandonment." *Reed v. Wiser*, 555 F.2d at 1093. Recently, this Court reversed the Second Circuit for substituting its policy judgment for the letter of the agreement adhered to and

[*]The decision below cites Tompkins, *The Warsaw Concention of 1929 and the Proposed Revisions of 1971*, 6 A.B.A. Forum 151 (1971), as construing the Montreal Agreement "as the adoption of absolute liability by the signatories." App. 7a, 724 F.2d at 1386. A careful reading of the Tompkins article shows, however, that when he referred to a shift from a "system of fault liability" to a "system of absolute liability", he was in fact discussing the Guatemala Protocol's proposed revisions to the Convention. 6 A.B.A. Forum at 157-58. Further, he found the policy justification for adopting absolute liability only for airlines and only as to international transportation to be a "disturbing question." *Id.* at 161.

implemented by its sister branches of government. *See Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. at 4449.

A writ of certiorari should issue to the Ninth Circuit because it has substituted its policy judgment for that of its sister branches to circumvent the fundamental prerequisite of liability imposed by the Convention. *See* 555 F.2d at 1093.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Appendix

In the United States Court of Appeals
For the Ninth Circuit

No. 83-1625

Valerie H. Saks,
Plaintiff-Appellant,

v.

Air France, a corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of California

Argued and submitted October 14, 1983

Decided Jan. 31, 1984

OPINION

Before: WALLACE, SCHROEDER and FERGUSON, Circuit Judges.

SCHROEDER, Circuit Judge.

Plaintiff-appellant, Valerie Saks, suffered a permanent hearing loss in her left ear while she was a passenger on an international flight operated by the defendant airline, Air France. The alleged cause was normal cabin pressurization changes during landing. Saks sued Air France for damages under Article 17 of the Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. (1929), art. 17. The

district court granted summary judgment for the airline on the ground that an injury caused by an air carrier's normal operation is not an "accident" within the meaning of Article 17. Relying on two cases out of the Third Circuit, the district court ruled Saks could not recover damages unless she could show some malfunction or abnormality in the aircraft's operation. *See DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977).

We reverse because we hold that a showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention. Imposition of such a requirement is not supported by either the language and history of the Warsaw Convention, the contractual modification to the Warsaw system known as the Montreal Agreement, or the decisions of many courts, including this one, which now interpret the Convention as imposing absolute liability for injuries proximately caused by the risks inherent in air travel.

Our analysis begins with the language of the treaty itself. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

A finding that an "accident" has occurred is essential to invoking the provisions of Article 17. *MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971). Yet nothing in the language of Article 17 or elsewhere in the Convention defines an "accident." Nor is there language in Article 17 or elsewhere in the Convention which makes improper or abnormal operation of the aircraft a prerequisite to recovery. In normal usage an "accident" is viewed from the perspective of the person experiencing the injury. One who is injured in a fall down the steps of an aircraft has surely had an "accident" even though the aircraft and the steps themselves functioned normally. *See Chuttle v. KLM Royal Dutch Airlines*, 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (fall from open door of aircraft is an "accident").

A standard dictionary definition of "accident" is an "event occurring by chance or arising from unknown causes." *Webster's New Collegiate Dictionary* (6th ed. 1979). When we look to a definition within the aviation context, we find the term "aircraft accident" expressly defined in annex 13 to the Convention on International Aviation, signed by the United States, France and others in 1944 and codified at 49 C.F.R. § 830.2. That definition is:

> *an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked,* and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. (emphasis added).

The situation here fits squarely within that definition; the effect of the aircraft's depressurization upon plaintiff's

ear is clearly an "occurrence associated with the operation of an aircraft."

More than definitions should be considered, however. We should interpret a treaty to give effect to its apparent purposes, taking into account both its legislative history and the conduct of the signatories subsequent to ratification. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). The district court's ruling in this case permits a carrier to avoid liability under the Warsaw Convention by showing that the plaintiff's injury, although caused by the aircraft, was not an "accident" because it resulted from normal carrier operations. Such a defense is, in essence, a restatement of the defense of due care. Yet that defense is no longer available in an action under the Warsaw Convention. The district court's decision in this case, like the decisions in *DeMarines* and *Warshaw* upon which it relied, is therefore contrary to the Warsaw Convention as it presently operates. This can be demonstrated clearly by tracing the history of that treaty from its inception to the present.

The Warsaw Convention[1] was concluded on October 12, 1929, during the infancy of international air travel. The

[1]The Warsaw Convention is officially titled "Convention for the Unification of Certain Rules Relating to International Transportation By Air." The official English translation of the original French version can be found at 49 U.S.C.A. § 1502, historical note (1976). The United States ratified the Convention in 1934. 49 Stat. 3000 (1934). It applies because the plaintiff was on an international flight between Paris, France and Los Angeles. *See* Article 1(2).

Convention's original purposes were two-fold: to establish uniform rules for the treatment of air travel and to limit potential carrier liability for air accidents so as not to frighten away potential investors.

The Convention established a fault-based system for carrier liability with the burden placed upon the carrier to show lack of negligence. The carrier could rebut the presumption by proving that all necessary measures to avoid the damage were taken or that it was impossible to take such measures. See Article 20(1).[2] In exchange for the presumption of negligence, the Convention limited carrier liability to $8,300 per passenger. *See* Articles 17, 22. Secretary of State Cordell Hull focused on the liability limitation when he transmitted the Convention to the United States Senate, stating:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to less litigation, but that it will also prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention

[2]Article 20(1) provided: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 49 U.S.C. § 1502, historical note (1976).

for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73rd. Cong., 2d Sess. 3-4 (1934).

From the beginning, however, the United States experienced difficulty with the $8,300 limitation.[1] In November, 1965, the United States denounced the Warsaw Convention and announced its intention to withdraw from the Warsaw system. 50 Dep't State Bull. 923 (1965). The United States offered to withdraw its denunciation before it took effect if an international agreement could be reached to raise the limits on liability. *Id.* at 924. Consequently, the Warsaw signatories convened in Montreal in 1966 to attempt to hold the Convention together. *See* Lowenfeld and Mendelsohn, 80 Harv. L. Rev. at 563.

In Montreal, the United States supported retention of the Warsaw Convention's negligence system, coupled with raising carrier liability to $100,000 per passenger. When this was rejected by the other signatories, withdrawal by the United States appeared imminent. To prevent that result, a group of international carriers, including Air France, reached a private interim agreement with the approval of the State Department, the Civil Aeronautics Board, and the International Air Transport Association. Montreal Agreement, CAB Order No. E-23680, 31 Fed.

[1]For a thorough discussion of the Warsaw Convention's history see this court's opinion in *In re Aircrash in Bali, Indonesia on April 11, 1974*, 684 F.2d 1301 (9th Cir. 1982). *See also* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) (Lowenfeld and Mendelsohn).

Reg. 7302 (1966).[2] The Montreal Agreement represented a true compromise; in exchange for raising the liability limit to $75,000 per passenger, the United States agreed to the elimination of the airlines' due care defense contained in Article 20(1). While the Montreal Agreement is not an official amendment to the Warsaw Convention, it is contractually binding on both the United States and Air France, and must be followed in our courts. 31 Fed. Reg. 7302 (1966).

Both courts and commentators have construed the Montreal Agreement as the adoption of absolute liability by the signatories. *See Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977)(en banc); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); Tompkins, *The Warsaw Convention-Proposed Revisions*, VI Forum 151 (1971); Lowenfeld and Mendelsohn, 80 Harv. L. Rev. at 599-602. *See also, In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1304-06 (9th Cir. 1982). The shift from negligence to absolute liability was in accord with the changed circumstances of the airline industry. By the 1960's, air travel was relatively safe and airlines were able to obtain insurance at reasonable rates.

Absolute liability made sense on several levels. First, it guaranteed to passengers the prospect of quick, less-expensive settlements. Lowenfeld and Mendelsohn, 80 Harv. L. Rev. at 600. Second, it was in harmony with theories of

[2]The full text of the Montreal Agreement can be found in Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 425 (1970).

accident cost allocation, since airlines could distribute among all passengers what would otherwise be a crushing loss to victims and their families. *Day v. Trans World Airlines, Inc.*, 528 F.2d at 34. Finally, absolute liability could be justified on the theory that while the passenger was in the airline's control, the airline could best prevent injuries from occurring. *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. at 707.

Since the Montreal Agreement, United States courts have extended Article 17 to a number of contexts never contemplated by the Warsaw Convention's original drafters. For example, airlines are now held liable for intentional acts such as hijacking or terrorist activities. As the *Husserl* court stated:

> Although hijacking was probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated, the Montreal Agreement seems to resolve whatever doubt existed over the construction of the word "accident." It is significant that press releases of the State Department and the order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier. (citations ommited).

Husserl v. Swiss Air Tranport Co., 351 F. Supp. at 706. Similarly in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), and *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977), two cases arising from a terrorist attack on passengers waiting to board a TWA flight in Athens, Greece, the Second and the Third Circuits ruled that the word "accident" was to be construed

broadly so as to effectuate better protection of the passenger. *See also Karfunkel v. Air France*, 427 F. Supp. 971, 975-76 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975).

This circuit has approved the Second and Third Circuits' analyses in *Day* and *Evangelinos*. *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.) (Wallace, J., concurring), *cert. denied*, 431 U.S. 974 (1977). In *Maugnie* we said that the "[Warsaw] Convention functions to protect passengers from the hazards of air travel and also spreads the acts and cost of air transportation among all passengers." *Id.* at 1259. Although the *Maugnie* court ruled that under the facts the plaintiff was too far removed from the airplane to qualify as having been in the process of embarking or disembarking for purposes of Article 17, the majority adopted a broad, cost allocation theory of liability under the Convention. *Id.* at 1260-62. These policy considerations also justify imposing liability when, as in this case, the normal operation of the aircraft has caused an injury.

In keeping with the concept of absolute liability embodied in the Warsaw Convention as contractually modified by the Montreal Agreement, the critical issue for courts to determine is causation rather than negligence. Thus, in *Chuttle v. KLM Royal Dutch Airlines, Inc.*, 132 F. Supp 611 (S.D.N.Y. 1955), a pre-Montreal Agreement case, the plaintiff had been assigned a seat near the front of the airplane, returned to the rear, and stepped out the open door while the loading ramp was being removed. The court was satisfied that "the accident causing the damage occurred within the terms of Article 17," *id.* at 613, but ruled against the plaintiff on contributory negligence and statute of limita-

tions grounds. *See also MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (plaintiff denied recovery in part because her collapse in the baggage area could not be attributed to anything associated with the flight); *Morris v. Boeing Co.*, 15 Av. Cas. (CCH) ¶17,241 (S.D.N.Y. June 29, 1978) (Article 17 requires a showing of proximate cause); *Scherer v. Pan American World Airways, Inc.*, 14 Av. Cas. (CCH) ¶17,410 (N.Y. App. Div. Oct. 14, 1976) (requirements of Article 17 not satisfied where plaintiff alleged only that he suffered thrombophlebitis while sitting aboard an airplane).

Indeed, the only recent cases that look beyond causation to how the carrier was operating at the time the injury occurred are the two cases out of the Third Circuit upon which the district court relied in this case. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977). In applying a restrictive, negligence-based definition of "accident" to injuries involving the effect of depressurization on passenger hearing, those decisions are out of step with the Montreal Agreement and every other recent decision imposing absolute liability on airlines for injuries caused by air travel.

Since in this case we must assume for purposes of review that the aircraft's depressurization caused the plaintiff's loss of hearing, and since depressurization is the product of aircraft operation, summary judgment was improperly granted for the airline. The case must be remanded for trial.

Reversed and remanded.

WALLACE, Circuit Judge, dissenting:

Although the majority adequately supports its conclusion, I am led to dissent because the majority has not faithfully followed the text of the Warsaw Convention (Convention), *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (*entered into force* Oct. 29, 1929). Saks alleges bodily injury as the result of normal aircraft cabin pressure changes during landing. Pressure changes are an everyday happening aboard commercial flights. The Convention, however, does not impose liability for all happenings, even if they cause damage.

The majority properly begins with the language of article 17 of the Convention: "The carrier shall be liable for . . . bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft . . . ." Unfortunately, the majority finds no other language in the Convention to assist in defining "accident." Thus, the majority overlooks article 18 which does help define "accident"; "The carrier shall be liable for damage . . . to any checked baggage or any goods, if the occurrence which caused the damage took place during the transportation by air." The Convention's United States text thus contemplates carrier liability for *accidents* injuring people and for *occurrences* damaging goods. The French text, *see* 49 Stat. 3000, 3005, preserves the distinction, too: carrier liability for "l'accident qui a cause le dommage" to people and for "l'evenement qui a cause le dommage" to goods.

Instead of relying on this instructive language in the Convention itself, the majority turns to the Code of Federal Regulations for a definition of "accident." But the sec-

tion cited was designed to facilitate information reporting to the National Transportation Safety Board and has little bearing on the distinction between accidents and occurrences created by the text of the Convention itself.

Because the text of this document makes a distinction between accidents and occurrences, we must fashion our interpretation of the Convention to accommodate the difference. The distinction drawn by the Third Circuit makes sense: "Absent testimony indicating that the plane's cabin pressure change was the result of some 'unusual or unexpected happening,' we have grave doubts that a finding that an accident occurred . . . is legally supportable." *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1197-98 (3d Cir. 1978); *see also Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 410 (E.D. Pa. 1977) (" 'out of the ordinary,' unanticipated incident" causing injury would amount to an "accident").

The Third Circuit's definition has nothing to do with negligence or the lack of it, so it would not undermine a proper concern for the elimination of the "due care" defenses accomplished by the Montreal Agreement, *see* Agreement C.A.B. No. 18900 (1966), *reprinted in* 1 L. Kreindler, *Aviation Accident Law* § 12A.03-.06 (1983); *see also* CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966). If an unusual change in air pressure occurred, it would fit the requirement of an accident under the Convention and Saks could recover by operation of the Montreal Agreement whether or not Air France were at fault for, or had taken all due care to prevent, the unusual change.

Under the majority's interpretation, an air carrier stands absolutely liable for any happening causing injury to a

passenger. The carrier would serve as the absolute insurer of its passengers' health. Assume a cardiac patient, excited by a normal takeoff, has a heart attack and dies. The majority would have the carrier pay. I would not. The heart attack would not arise from an accident; the smooth takeoff would not be an *unusual* occurrence, yet might be a proximate cause of death.

On the other hand, the rule of "unusual or unexpected occurrence" would not stifle recovery for typical accidents, even small ones. A passenger orders hot coffee in flight. As he sets it on his seat tray, the airplane hits a small pocket of clear-air turbulence and the coffee spills, burning him. Although small bumps from air turbulence are usual in commercial flight, any particular one may be unexpected and an accident under the Convention. The burned passenger can recover under the Convention.

Some accidents have a quality of unexpectedness because of the actions of the victim, too. Such was the case in *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611 (S.D.N.Y. 1955). A passenger does not usually get up when he should be sitting, go to the back of a plane, and step out the open door when the ramp crew has moved the stairs away. The aircraft and the ramp crew worked perfectly; the passenger was the defective link. In these cases, the air carrier need not concern itself with the absence of a due care defense after the Montreal Agreement because the defense of contributory negligence, *see id.* at 616, remains undisturbed in article 21 of the Convention, *see* Department of State Memorandum, United States Government Action Concerning the Warsaw Convention 4 (May 5, 1966), *reprinted in* 1 L. Kreindler, *Aviation Accident Law* § 12A.07[1] (1983).

The analysis given in *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, 372, *cert. denied*, 409 U.S. 878 (1972), of liability under the Convention after the Montreal Agreement, is also instructive:

> In effect a carrier says to its passenger . . . "If we breach our duty to transport you as agreed . . . the amount of damages that can be recovered from us . . . is limited to a maximum of $75,000, but no negligence on our part has to be established as a prerequisite to a recovery." Such an agreement contains none of the basic elements of an insurance contract. It is exactly what it purports to be, a waiver of certain defenses in return for a limitation of liability in event of an action alleging a breach of duty and damages therefrom.

The duty prescribed by the Convention of carriers to passengers remains unchanged by the Montreal Agreement: to transport as agreed, free of accidents, not of all occurrences. The agreed transport includes pressurization of the passenger cabin.

Another consideration is persuasive to me but apparently not to the majority. Until now, only one circuit court has spoken on this issue. The majority has chosen to create a conflict. When an occurrence, not an accident, happens on two non-stop flights, one between London and Los Angeles and the other between London and Philadelphia, whether the passenger recovers depends on where suit is brought. I believe there is a substantial interest in uniform interpretation of treaties such as the Convention. *See Evangelinos v. Trans-World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir. 1977); *Block v. Compagnie Nationale Air*

France, 386 F.2d 323, 338 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). I would not create a conflict here.

Like *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977), the majority's reading of the Convention "is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers," *id.* at 1263 (Wallace, J., concurring in result), a theory alien to the Convention's language, even accounting for the private Montreal Agreement. Recovery for damages under article 17 of the Convention requires more than travel or an occurrence; it requires an accident. Normal cabin depressurization is no accident. I would affirm the district court.

United States District Court
Northern District of California

No. C-82-0330 EFL

Valerie Hermien Saks,
Plaintiff,

vs.

Air France, et al.,
Defendants.

Filed Jan. 12, 1983

ORDER

Plaintiff in this action seeks damages for a total loss of hearing in her left ear which she alleges resulted from normal cabin pressurization changes that occurred onboard Air France flight 003 between Paris, France and Los Angeles, California on November 16, 1980. Defendant Air France has moved for summary judgment on the issue of liability.

Plaintiff has alleged that the injury occurred while the aircraft was descending for landing and concurrently repressurizing. There is no dispute that at all times during the descent the cabin pressurization system of the aircraft operated normally. The parties agree that the provisions of the Warsaw Convention, 49 Stat. 3000 (set forth following 49 U.S.C. § 1502), as modified by the Montreal Agreement, 31 Fed. Reg. 7302 (1966), apply to this action. The sole question presented to this Court is whether a loss of hearing proximately caused by normal operation of the

aircraft's pressurization system is an "accident" within the meaning of Article 17 of the Warsaw Convention, which sets forth the liability of the carrier as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The United States District Court for the Eastern District of Pennsylvania considered essentially this precise question in *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D.Pa. 1977). After careful review of the legislative history of the Warsaw Convention and United States case law concerning the interpretation of the term "accident" in Article 17, that court concluded that an ear injury caused by normal cabin pressurization changes during the aircraft's descent for landing was not an "accident" covered by the Convention. The Third Circuit concurred with this interpretation in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978).

The Court finds no reason to differ in its interpretation of the term "accident" in this context. The broad view of the term indicated by cases which recognize as "accidents" such modern air hazards as hijacking and terrorist attacks, *see Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1259 (9th Cir. 1977) (and cases cited therein), nonetheless contemplates some unusual event precipitating injury. Here, nothing unusual occurred in the operation of the aircraft.

Accordingly, defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

DATED: January 12, 1983.

/s/ EUGENE F. LYNCH
Eugene F. Lynch
United States District Court
Judge

JUDGMENT

United States Court of Appeals
For the Ninth Circuit

No. 83-1625
DC CV 82-0330 EFL

Valerie H. Saks,
Plaintiff-Appellant,

vs.

Air France, a corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered January 31, 1984

Articles 17-25 of the Warsaw Convention, concluded Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, reprinted at 49 U.S.C. § 1502 note.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

[CAB Agreement No. 18900 ("the Montreal Agreement")]

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

> Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of [certain]*
> [(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven

*Either alternative may be used.

damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

31 Fed. Reg. 7302 (1966)

[Docket No. 17325, Order No. E-23680]

Liability Limitations of Warsaw Convention and Hague Protocol

Order Approving Agreement

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention.[1] On November 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including

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[1]The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense

under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability,

and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The U.S. Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly section 102, 204(a), and 412 thereof:

It is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board.

[Seal] HAROLD R. SANDERSON,
Secretary.

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
JUN 22 1984
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No. 83-1785 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the decision below, not directly in conflict with the decision of any other federal court, correctly rule that the Warsaw Convention and the Montreal Agreement impose liability upon international airlines for a passenger's sudden and extreme pain during repressurization of the cabin during descent, resulting within 24 hours in total and permanent hearing loss?

2. Should the term "accident" in Article 17 of the Warsaw Convention be narrowly interpreted to require, as a precondition of a passenger's recovery, proof of a sudden malfunction in the airplane, even though such an interpretation would be contrary to a forty year trend among Warsaw signatories and American courts to impose absolute liability upon airlines for all injuries caused to passengers irrespective of fault or airline malfunction?

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Respondent Valerie Hermien Saks was a perfectly healthy passenger when she boarded Petitioner's plane in Paris. Upon the plane's descent into Los Angeles, she suffered extreme pain and pressure in her left ear that resulted within a day in permanent and total hearing loss.

This Court should not grant a writ of certiorari to review the decision of the Ninth Circuit permitting Ms. Saks to recover for her hearing loss from Petitioner. As shown below, the Ninth Circuit decision is not directly in conflict with any other federal decision, nor does the prospect of compensation for injuries caused by non-negligent airline operations affect more than an insignifi-

cant number of passengers, so that this case does not contain an important question of federal law for this Court to resolve.

The Warsaw Convention was adopted to protect commercial international aviation during its infancy. Since then, however, both the signatory parties to the Convention and American Courts have consistently recognized that international air travel, which now takes place with unprecedented safety and frequency, is no longer in need of artificial protection from the predictable risks inherent in the enterprise. The willingness of the airline industry to submit to absolute liability in the Montreal Convention is itself a recognition not only that air travel is safe and commonplace, but that the financial burden of injuries to innocent passengers is better placed on the airline, with its superior ability to avoid hazards, to prove the manner in which injuries are caused, and to anticipate and insure against injuries to passengers. Moreover, the imposition by this Court of the requirement that a passenger demonstrate a sudden and unusual malfunction in the operation of an airplane as a precondition to recovery would defeat the speedy resolution of claims which was a primary goal of the Montreal Convention.

If this Court accepts Petitioner's position, then the anomaly will have been created that an airline stewardess who suffers a permanent and total hearing loss due to the "normal" repressurization of the cabin during descent will be able to recover for her injury under the absolute liability principle of the applicable workers' compensation program, but the passenger sitting in the same cabin who suffers the same injury from the same cause, will recover nothing.

Petitioner's semantic quibbling over the term "accident" in the Warsaw Convention has no foundation in the history of the Convention nor in the subsequent 50 years of expanded airline liability. Moreover, modern applications of the term "accident" embrace any event or occurrence which causes an adverse and unexpected harm from the standpoint of the injured person. The Third Circuit cases upon which Petitioner relies so heavily are not in conflict with the Ninth Circuit decision below because the Third Circuit cases present the different circumstance of an ill and previously hearing-impaired passenger with a history of surgery or do not squarely reach a holding on the point in issue. The conflict which Petitioner makes so much of, therefore, simply does not exist.

Petitioner already enjoys a ceiling of $75,000 on its liability, a protection that is not available in our courts to any other modern industrial enterprise. Petitioner surely does not need additional insulation from liability at the expense of innocent and unsuspecting passengers.

For these reasons, the Petition for Certiorari should be denied.

I

THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS ON THE PROPER CONSTRUCTION OF "ACCIDENT" IN THE WARSAW CONVENTION

Petitioner contends that the Ninth Circuit's authorization of recovery for a passenger who suffers sudden and unexpected injuries conflicts with the decisions of other Circuits. This is not so. The two decisions within the Third Circuit either present different facts or do not reach a holding on

the point here in issue. Moreover, the willingness of the Courts of every circuit to hold that airline terrorism or hijacking is an "accident," despite the intentional nature of the misconduct and without requiring any proof that airline equipment or security systems malfunctioned, shows that the Ninth Circuit was correct in construing Respondent's sudden and unexpected hearing loss as an "accident" within the meaning of the Warsaw Convention.

A. The Third Circuit Has Not Reached A Holding in Conflict With the Ninth Circuit

Petitioner loudly proclaims a supposed conflict between the Third Circuit and the Ninth Circuit. But Petitioner fails to acknowledge that in the two Third Circuit decisions discussed below, either different facts were involved—specifically an ill passenger with a history of prior hearing problems and ear surgery—or the Court simply did not reach a holding on the point here in issue.

In *Warshaw v. Trans World Airlines, Inc.*, 442 F.Supp. 400 (E.D.Pa. 1977), the plaintiff was suffering from an upper respiratory tract infection at the time of the flight. Upon landing he was unable to clear a blockage in his left ear, with resulting permanent damage to the nerve and complete loss of hearing in the left ear. The Court found that the plaintiff's eustachian tubes were blocked by mucous and the swollen linings of the tubes because of the plaintiff's illness.

Two years prior to the flight, plaintiff had undergone a stapedectomy, surgery to his left ear involving a penetration of the eardrum and the replacement of the calcified stapes. On the basis of medical testimony, the District Court

concluded that plaintiff's injury was caused by his peculiar condition, including the prior stapedectomy and the cold that he was suffering.

Upon these facts, the District Court ruled that an "accident" was not involved in the case because the Warsaw signatories had not intended that the airlines should be "in the position of absolute insurers of the health of their passengers." 442 F.Supp. at 411. The District Court denied liability, concluding that the event that damaged plaintiff's hearing was not an accident because it resulted "solely from the state of health of the passenger and is unconnected with the flight." 442 F.Supp. at 412. A fair reading of *Warshaw* shows that it was the plaintiff's own health problems that contributed to his injury, which supported the court's conclusion that the normal functioning of the aircraft could not constitute "an accident" within the Warsaw Convention.

Warshaw is thus utterly distinguishable from the instant case in that there is no evidence that the Respondent's loss of hearing was in any way caused by any illness.

Further, *Warshaw* is not well-reasoned in that it fails to give any effect to the removal of due care and impossibility defenses accomplished by the Montreal Agreement and the resulting imposition of absolute liability upon the airline.

Therefore, *Warshaw* does not present a direct conflict with the decision below.

The decision in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978) also does not present the clear conflict which Petitioner asserts. The plaintiff obtained a judgment against the airline for an injury suffered during

the repressurization of the cabin. Addressing the question of whether or not the plaintiff had proved an "accident" within the meaning of the Warsaw Convention, the Court of Appeals for the Third Circuit did *not* reach a conclusion on this question. Because the Court of Appeals did not recognize the illness and prior surgery suffered by the plaintiff in *Warshaw*, it did state that it found the instant difficult to distinguish from *Warshaw*. Nevertheless, the Court of Appeals did not decide that plaintiff's evidence was not sufficient to go to the jury because the defendant had not timely moved for directed verdict after presentation of all the evidence and therefore was unable to assert error in the denial of its request for a judgment n.o.v. after the jury's verdict for plaintiff.

In summary, neither *Warshaw* nor *DeMarines* present clear holdings that conflict with the Ninth Circuit's decision in the instant case.

B. The Decision Below Is Consistent With Numerous Other Decisions of Other Circuits Permitting Recovery Despite the Lack of Any "Accidental" Conduct of the Airline

In criticizing the Ninth Circuit for not focussing on the normal repressurization of the cabin for the determination of "accident," Petitioner overlooks the consistent willingness of federal courts to interpret "accident" from the passenger's standpoint, without regard to the fault or unexpected conduct of the airline, its equipment or personnel. The most prominent example is hijacking. Federal courts have uniformly held that a hijacking constitutes an "accident" supporting recovery under the Warsaw Convention and the Montreal Agreement, even though a hijacking is

clearly intentional and not "accidental" in the sense of being inadvertent, and even though there may be no evidence that the airline was at fault, or that its personnel or equipment malfunctioned in a sudden or unexpected way.

For example, in *Husserl v. Swissair Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd mem.* 485 F.2d 1240 (2d Cir. 1972), the District Court held that a hijacking is "an accident" within the meaning of Article 17 of the Warsaw Convention. Although the airline argued that the cause of the plaintiff's injuries was intentional misconduct and therefore not "an accident," the District Court noted that the intention of the United States as reflected in the statements of its government did not at all emphasize the word "accident" but stressed the imposition of "absolute liability" by the Montreal Agreement.

> It is significant that press releases of the State Department and the order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier. 351 F.Supp. at 706.

Moreover, the District Court noted that the only specific exception to liability provided in the Montreal Agreement was "in respect of any person who has willfully caused damage." The District Court therefore drew the inference that persons injured in any other fashion apart from willfully causing damage would be able to recover, even for the acts of sabotage by others to the aircraft. 351 F.Supp. at 707.

Finally, the District Court was motivated by the "policy underpinnings of the Warsaw Convention". 351 F.Supp. at 707.

> The Warsaw Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents, since it physically controls the aircraft and access to it; it is likewise the party most capable of assessing and insuring against the risks associated with air transportation; finally, it is the party most able to distribute efficiently the costs of the first two steps. 351 F.Supp. at 707.

Similarly, with regard to the plaintiff's injury from the pressurization of the cabin, certainly the airline is in the best position to protect passengers from injury from pressurization, the airline is the party most capable of assessing and insuring against the risks of hearing loss from pressurization, and the airline is the party most able to distribute efficiently the costs of the previous safeguards.

The policy of accident cost allocation motivated the Court of Appeals for the Second Circuit to adopt a broad interpretation of the term "accident." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). The court in *Day* ruled that a hijacking was an accident and that the plaintiff passengers were within the course of embarking at the time they were assaulted in the terminal. The court was motivated to reach these conclusions by:

> modern theories of accident cost allocation. The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become "accident" victims. [Citation.] Equally important, this interpretation fosters the goal of accident prevention. 528 F.2d at 34.

Finally, the Court noted that recovery under the Warsaw Convention should be preferred to the alternative method of a costly suit in a foreign country involving not only the additional expense and inconvenience but also the requisite proof of fault that would "unduly postpone payments urgently needed by the seriously injured victim or his surviving dependents." 528 F.2d at 34.

After examining the denunciation by the United States of the Warsaw Convention that led to the Montreal Agreement, the Court of Appeals in *Day* stated that the Warsaw Convention:

> now functions to protect the passenger from the many present-day *hazards of air travel* and also spreads the accident cost of air transportation among all passengers. [Citation.] This is amply demonstrated by the imposition of *absolute liability* and the establishment of greatly increased limits of liability. . . .
>
> We conclude, in sum, that the *protection of the passenger* ranks high among the goals which the Warsaw signatories now look to the Convention to serve. 528 F.2d at 37 (emphasis added).

Accord, *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc).

If the intentional infliction of harm by third parties qualifies as an "accident," without any showing of airline negligence or malfunction, surely an innocent passenger's loss of hearing, which is sudden and unexpected to both the passenger and the airline, must also qualify as an accident

under the preceding cases. The policy of protection for the passenger by the imposition of absolute liability permits no other conclusion.

II

THE DECISION BELOW DOES NOT ABROGATE A TREATY PROVISION AND DOES NOT FUNDAMENTALLY CHANGE THE LIABILITY OF ALL INTERNATIONAL AIR CARRIERS SERVING THE UNITED STATES

Since the Chicago Convention on International Civil Aviation in 1944, the international community and American courts have, at every opportunity, expanded the responsibility of international carriers for injuries to passengers, regardless of the absence of airline fault or malfunction. Petitioner's hyperintellectual hair-splitting over the term "accident" ignores forty years of accepted expansion of the rights of passengers, which dictates recovery in this case, consistent with the Warsaw Convention, as modified by the Chicago Convention and by the Montreal Agreement. The decision below therefore did not abrogate a treaty provision and review by this Court is not warranted.

In 1944 members of the international aviation community gathered to establish the International Civil Aviation Organization. Among the documents generated by this organization is Annex 13, "Aircraft Accident Inquiry," to the Convention on International Aviation, signed by the United States, France, and others at Chicago on December 7, 1944. Annex 13, is published (pursuant to Article 90 of the Convention on International Civil Aviation) by the Secretary General, International Civil Aviation Organization, International Aviation Building, 1080 University Street, Montreal, Canada as follows:

> *"Aircraft Accident":* An *occurrence associated with the operation of an aircraft* which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which: (a) Any person suffers death or serious injury *as a result of being in or upon the aircraft* or by direct contact with the aircraft or anything attached thereto .... (emphasis added)

This ICAO definition has been adopted verbatim by the United States. 49 C.F.R. § 830.2. Clearly the repressurization of the cabin during landing is an "occurrence associated with the opeation of an aircraft." Therefore under the ICAO definition of accident, the Ninth Circuit decision permitting Respondent's recovery is clearly correct. Cf. *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (inhalation of asbestos is an "occurrence" because it is neither expected nor intended from the standpoint of the asbestos manufacturer, even though the manufacturer knew that persons using its product would be exposed to asbestos). See also *Ketona Chemical Corp. v. Globe Indemnity Co.*, 404 F.2d 181, 185 (5th Cir. 1968) ("accident" is an "unexpected, untoward event which happens without intention or design").

Regarding the definition of "occurrence," it should be noted that one State Supreme Court followed the very broad dictionary definition of "occurrence," "the general word for anything that happens or takes place," or "something that occurs; event; incident," so that the term "occurrence" was permitted to refer to "damage-causing, non-accidental

events." *Insurance Co. of North America v. Sam Harris Constr. Co.*, 22 Cal.3d 409, 412, 583 P.2d 1335 (1978).

The soundness of the Ninth Circuit's decision is apparent from the Montreal Agreement's removal of the due care and impossibility defenses, inaugurating the era of absolute liability for airlines. Petitioner's assertion of a narrow definition of "accident" is inconsistent with the Montreal Agreement and with the conduct of the United States government and United States Courts following the Agreement.

For example, the ticket advice to passengers as modified by the Montreal Convention is not limited to the technical definition of "accident" proposed by your Petitioner. The advice to passengers states that:

> Liability of [the carrier] for death of or personal injury to passengers is limited [to $75,000.00 per passenger] and that this liability up to such limit shall not depend on negligence on the part of the carrier.

The only phrase of limitation is "personal injury." Nothing is said in the advice to passengers that the personal injury must be caused by a sudden and unusual occurrence involving the operation of the airplane.

The importance of adequate notice to the passenger of the limitations of liability under the Warsaw Convention is so great that where the notice is defective, the limitations of the Convention do not apply. This was the holding of *Lisi v. Alitalia-Linee Aeree Italiane, Sp. A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968). Suits for wrongful death and personal injuries and property damage were brought arising out of an air crash shortly after takeoff in Ireland. On a pretrial motion

regarding the defense of limited liability under the Warsaw Convention, the Court of Appeals ruled under the Warsaw Convention's Article 3(2) and Article 4(4) that the carrier may not enjoy the limitations of liability unless it delivers a ticket to a passenger or a baggage check with respect to baggage. The delivery requirement entailed a requirement that the notice be adequate, and the Court of Appeals found the notice to be inadequate because the text was "in exceedingly small print," 370 F.2d at 513, and therefore could not "reasonably" have given the passengers the required notice. 370 F.2d at 514.

In support of its determination that the ticket notice was inadequate, the Court of Appeals for the Second Circuit in *Lisi* cited *Mertens v. Flying Tiger Airline, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), in which the Second Circuit determined that presenting a ticket to a passenger after he boarded the airplane did not constitute "delivery" within the meaning of Article 3(2).

The *Lisi* court also cited *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (1965) and its holding that the presenting of a ticket or pass to the passenger at the foot of the ramp leading to the aircraft was not "delivery" because it was not made sufficiently in advance that the passenger would have an opportunity to take self-protective measures, such as purchasing additional insurance if he so chose.

The importance of making the damage limitation to plain to passengers was articulated by the *Lisi* court as follows:

> This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which

> the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently travelled domestically, the amount they may recover in the event of an accident is drastically reduced. 370 F.2d at 513.

The importance of the notice on the ticket was underscored in *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973). The airline brought suit, contending that the notice required by the C.A.B. conflicted with the Warsaw Convention. In the course of upholding the C.A.B. order, the Court of Appeals observed with pertinence for the instant case that the prior cases on the issue of the adequacy of the ticket notice require:

> that passengers be afforded ample opportunity to comprehend the limitations of liability to which they are subjected, and that they be given a chance to purchase alternative, private insurance. Passengers are not to be required to traverse an obstacle course created by the carriers in order to successfully discover the nature of their rights and substance of the carriers' limitations on liability. The passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained. 479 F.2d at 917.

The importance of the ticket notice was again underscored in *Krystal v. British Overseas Airways Corporation*, 403 F.Supp. 1322 (C.D. Cal. 1975). The question was whether the plaintiff could recover for mental distress arising from a hijacking. The court was of the opinion that the effect of the Montreal Agreement was "to prevent recovery for mental distress" because the ticket notification of

the limits of the Warsaw Convention contained only the words "personal injury." This was different from the Convention's terminology of "wounding . . . or bodily injury." Because the wording of the Warsaw Convention was subject to more than one interpretation, and because the notice to passengers dictated by the Montreal Agreement did not clearly exclude mental suffering, the District Court permitted the plaintiff to recover for mental injuries. See also *Husserl v. Swissair Transport Co., Ltd.*, 388 F.Supp. 1238, 1250 (S.D. N.Y. 1975). (Husserl II.)

Consequently, where the ticket advice authorized by the Montreal Agreement refers only to "personal injury," it is improper for Air France now to ask this Court to impose the additional limitation, of which Respondent had no notice, that the injury be caused by a sudden and unexpected malfunction of the aircraft.

The United States' broad interpretation of the Montreal Agreement is apparent from the Civil Aeronautics Board order approving the Montreal Convention on May 13, 1966, which says nothing about the necessity of a sudden and unusual event in the operation of the aircraft, but only states that the Convention provides up to $75,000.00 of liability for "death, wounding, or other bodily injury."

The intent of the United States in adopting the Montreal Convention is also made clear in a memorandum of the State Department submitted to the United States Senate characterizing the Montreal Convention as imposing "absolute liability" upon the airline and requiring the claimant only to prove "the amount of his damages," saying nothing about a requirement that the claimant also prove that the damage was caused by the sudden and unusual occurrence

for which the Petitioner contends. L. Kreindler, Aviation Accident Law, § 12A.07(1983).

Moreover, the press release issued by the Civil Aeronautics Board and the Department of State on May 13 and May 14, 1966, described the Montreal Convention as an agreement whereby "the participating carriers are accepting the principle of absolute liability, i.e., liability without fault on the part of the airline." Nothing was said in the press release that a passenger had to prove a sudden and unusual occurrence on the part of the aircraft in order to obtain compensation up to the new limit of $75,000.00.

Finally, when the United States Government formally withdrew its notification of termination of adherence to the Warsaw Convention as a result of the Montreal Convention, the United States delivered a note to the Polish Ministry of Foreign Affairs which articulated the United States':

> continuing objectives of uniformity of international law and *adequate protection for international air travelers.* (emphasis added)

Quoted in full in L. Kreindler, supra, § 12A.07[3].

The absolute liability recognized by the Ninth Circuit under the Montreal Agreement applies in similar areas of tort law. For example, when the defendant's conduct has an unexpected impact on the plaintiff quite beyond the foreseeable risk, the courts are uniform in holding the defendant responsible for that unforeseen consequence. This principle is summarized in the phrase "eggshell skull," wherein the defendant is held liable for the death of a man who has suffered a bruise that would normally cause only a

bump on the head. *Dulieu v. White* [1901] 2 K.B. 669, 679, discussed in W. Prosser, Law of Torts 262 (1971). A related rule, observes Dean Prosser, is that in wrongful death, the defendant takes his chances as to whether the plaintiffs' decedent had a large income.

Thus, it is established that the defendant bear the consequences of whatever unique circumstances might aggravate the impact of the defendant's activity upon the plaintiff, even to an extent beyond the commonplace.

Another example of the defendant's liability for consequences that do not commonly occur is the area of idiosyncratic drug reactions. Under the general rule of product liability, as summarized in the Restatement (2d) of Torts § 402A, the manufacturer of a product is liable for physical harm caused to the ultimate consumer, even though the manufacturer has exercised all possible care in the preparation and sale of the product. In Comment *j*, the drafters of the Restatement observed that where the product contains an ingredient to which a substantial number of the population are allergic and the ingredient is one whose danger is not generally known or the ingredient would not reasonably be expected to be found in the product, the seller is consequently required to give warning against the ingredient if he knows of the danger it presents.

In this light, courts have imposed liability on drug manufacturers for failing to warn of adverse reactions, even though the number of people having an adverse reaction was small. *Tomer v. American Home Products,* 368 A.2d 35 (Conn. 1976); *Crocker v. Winthrop Laboratories,* 514 S.W.2d 429 (Texas 1974).

The interpretation of "accident" for which your Petitioner contends erects an artificial barrier to compensation by requiring a sudden occurrence on the part of the aircraft as opposed to a sudden occurrence experienced by the passenger, thus retreating to the judicial philosophy of aviation's early days when the airlines were seen as needing the protection of the courts. In the early days of aviation, the hazards were considered to be enormous and the rules affording compensation were accordingly quite strict. As recently as 1938, the Restatement of Torts categorized aviation as an ultra-hazardous activity. Restatement of Torts, § 520, comment *d*, comment *g* ("Aviation has not as yet become either a common or an essential means of transportation," and airplanes "have not been so perfected as to make them subject to a certainty of control.").

It was against this climate of opinion that the Warsaw Convention was adopted by the United States to limit liability for personal injury to $8,300.00 and to deny liability if the airline had taken all "necessary measures to avoid the damage" or such measures were "impossible".

One court has characterized the Warsaw Convention as manifesting "parental concern for the infant industry," *Windbourne v. Eastern Airlines, Inc.*, 479 F.Supp. 1130, 1140 (E.D.N.Y. 1979), *rev'd. on other grounds*, 632 F.2d 219 (2d Cir. 1980). The *Windbourne* court further observed that between 1929 and 1965, the dates of the Warsaw Convention and the Montreal Convention, the aviation industry, "nurtured by industrial advancements in science and technology . . . matured into a comparatively safe, swift and profitable business." 479 F.Supp. at 1140. In short, if any reason existed fifty years ago to adopt Petitioner's narrow

construction of the term accident, that reason no longer exists today.

Federal courts have not looked with favor upon the semantic quibbling which Petitioner engages in over the term "accident." For example, where the plaintiff has suffered injury by attempting to wave good-by to a family member from an open door, falling out of the door as the loading ramp was being pulled away, the District Judge considered and rejected the contention that the damage was not compensable under the Warsaw Convention because it had not occurred "on board the aircraft" as required by Article 17. The District Judge held that the plaintiff's fall from the aircraft was covered by the Warsaw Convention because "[t]o hold otherwise would be an unwarranted dissection of minute and almost undefinable areas from the coverage of the Convention." *Chutter v. KLM Royal Dutch Airlines*, 132 F.Supp. 611, 613 (S.D.N.Y. 1955).

Similarly, Petitioner, by quibbling over the term "accident" and attempting to read into that term a requirement of a sudden and unusual occurrence on the part of the aircraft, is engaging in "an unwarranted dissection of minute and almost undefinable areas from the coverage of the Convention" which should similarly be rejected by this Court in the denial of the Petition for Certiorari.

The position of Petitioner is adverse to the rule that the construction of a treaty should favor the rights claimed under it. In *Maschinenfabrik Kern, A.G. v. Northwest Airlines*, 562 F.Supp. 232 (N.D. Ill. 1983), the plaintiff shipper sought recovery for damages to duplicating machines. The airline defended on the ground that notice had not been given to the airline as required under Warsaw Convention

Article 26(2). The Court of Appeals held that notice to the destination carrier was sufficient because the defendant Northwest was one carrier in the chain. The Court of Appeals accepted the plaintiff's "liberal construction" under which Article 26 is satisfied by giving notice to any of the successive carriers involved in a single transportation of goods.

In embracing this liberal construction, the District Court followed the rule of treaty construction that:

> In construing [a] treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose . . . we proceed under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to the rights claimed under it, the latter is preferred. 562 F. Supp. at 236 (citation omitted).

For the reasons set forth above, the Ninth Circuit decision does not violate a treaty provision, nor does it fundamentally change the liability of international air carriers, since the liability of the carriers was radically altered by the Montreal Convention almost twenty years ago to support the result reached by the Ninth Circuit. Consequently no ground exists for review by this Court.

CONCLUSION

The Petition for writ of certiorari must be denied.

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REPLY

BRIEF

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

VS.

VALERIE HERMIEN SAKS,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION

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No. 83-1785

In the Supreme Court

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OCTOBER TERM, 1983

AIR FRANCE,
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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION

Respondent disingenuously claims that there is no conflict among the Circuits on the Warsaw Convention's fundamental prerequisite for liability, an accident. Respondent's other arguments are appeals to unrelated sources to support the claim that "accident" means "occurrence," a position that the Warsaw parties have considered but not adopted.

The conflict among the Circuits is explicit. The decision below unequivocally rejected as "out of step" Third Circuit precedent construing the term "accident". App. 10a, 747 F.2d at 1388. Respondent attempts to dismiss as semantics the clear construction of the Warsaw Convention, while ignoring the Convention's subsequent history on this fundamental point. Respondent then advances a myriad of policy reasons why the Ninth Circuit's disregard of the treaty's language is justified. A cursory review of these policy arguments shows the importance of the questions

presented by the petition and the novelty and expansiveness of the liability theory the Ninth Circuit has propounded.

I

THE DECISION BELOW CANNOT BE DISTINGUISHED FROM CONFLICTING THIRD CIRCUIT PRECEDENT

Respondent's facile attempts to distinguish the decision below from Third Circuit precedent ignore what the courts themselves have said. *DeMarines* defined the term "accident" in article 17 of the Convention and instructed a district court on its application. *See* 580 F.2d at 1196-98. In the present action, the district court found *DeMarines* and *Warshaw* (discussed with approval in *DeMarines)* to be indistinguishable and, following them, dismissed the complaint. App. 16a-17a. In reversing, the Ninth Circuit did not embrace the factual distinction urged by respondent in both courts below. Instead, it directly repudiated the Third Circuit's "accident" analysis as "out of step" with other authority and held that "a showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention." App. 2a, 724 F.2d at 1384; *see* App. 10a, 724 F.2d at 1388.

Respondent's argument that there is no conflict among the Circuits because *DeMarines'* definition of "accident" was merely an instruction to the district court on remand rather than a "holding" is hollow. No district judge sitting in the Third Circuit would doubt that "a showing of a malfunction or abnormality in the aircraft's operation" *is* a "prerequisite for liability under the Warsaw Convention."

See App. 2a, 724 F.2d at 1384; *compare* 580 F.2d at 1197. The conflict could not be clearer.[1]

II

RESPONDENT'S OTHER ARGUMENTS CONFIRM THE IMPORTANCE OF THE QUESTIONS PRESENTED BY THE PETITION

A. Respondent Attempts to Dismiss as Semantics a Prerequisite for Convention Liability Deliberately Imposed by the Treaty Nations

The duty of a court is "to interpret [a treaty] and administer it according to its terms." *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1857). Respondent, however, would have the Court dismiss as mere semantics a fundamental conflict concerning construction of the terms of the Convention and impose notions of social policy ungrounded in the language of the treaty. Respondent's appeals to policy concerns in lieu of the language of the treaty and its subsequent history only underscore the fundamental importance of the issues raised by this controversy.

The Convention distinguishes between "accidents" and "occurrences"; only a personal injury caused by an "accident" is compensable by its terms. That this distinction is deliberate is demonstrated by the Convention's subsequent

---

[1]Respondent also would have the Court distinguish Warshaw v. Trans World Airlines, Inc. 442 F. Supp. 400 (E.D. Pa. 1977) on the basis that the plaintiff in that case had a prior history of hearing problems. The *Warshaw* court did not rely on this evidence but ruled instead that routine repressurization is not an accident for purposes of article 17. *See* 553 F. Supp. at 407. *Warshaw* has been much cited for its discussion of the term "accident"; yet we are aware of no decision which suggests that *Warshaw* be restricted to its facts as respondent has proposed.

history. As explained in some detail in the petition, an amendment to article 17, never entered into force, would have replaced the term "accident" with "events" as part of an overall scheme to provide strict liability for passenger injury. *See* Petition 14-15 & n.22. That such a change was considered but not adopted shows that an "accident" is an independent condition for liability under the Convention.

Rather than construe and enforce the language of the Convention, respondent would have the Court import a definition of "accident" from an unrelated source. In particular, respondent urges a definition of "accident" based on Annex 13 to the 1944 Chicago Convention on International Civil Aviation and found at 49 C.F.R. § 830.2. This section was, however, "designed to facilitate information reporting to the National Transportation Safety Board and has little bearing on the distinction between accidents and occurrences created by the text of the Convention itself." App. 12a, 724 F.2d at 1388.[3]

B. Respondent's Social Policy Arguments Highlight the Novelty and Expansiveness of the Ninth Circuit's Theory of Liability

Most of the brief in opposition is devoted to arguing the merits of the decision below on the basis of such policy matters as "accident cost allocation." *See* Brief in Opposition 8. The analogies with which respondent supports these arguments demonstrate the importance of the questions presented and the novelty of the Ninth Circuit's theory. The decision below overstepped the bounds of the judicial function. Respondent urges the Court to ratify this usurpation of legislative power, asserting that international air carriers should be made the insurers of their passengers' health because they are supposedly better situated than their passengers (and apparently also than domestic carriers) to insure against the risks inherent in air travel. This is an argument which should be addressed to the treaty parties, who to date have been unwilling to adopt respondent's and the Ninth Circuit's position.

[3]Respondent likewise seems to contend that the Montreal Agreement somehow altered the meaning of "accident" in article 17. As explained in the petition, this was not its signatories' intent. *See* Petition 15-16; Rosman v. Trans World Airlines, 13 Av. Cas. (CCH) 17,231, 17,232 (N.Y. Ct. App. 1974); Sheris v. Sheris Co., 212 Va. 825, 188 S.E. 2d 367, 372, *cert. denied*, 409 U.S. 878 (1972).

The main thrust of respondent's policy arguments is to quote from decisions which have extended carrier liability under article 17 to injuries resulting from the intentional acts of terrorists and hijackers. These decisions, however, make clear that the occurrence of an "accident" remains a threshold requirement before liability is triggered. *See Husserl v. Swissair Transport Co., Ltd.*, 351 F. Supp. 702, 706 (S.D. N.Y.), *aff'd mem.*, 485 F.2d 1240 (2d Cir. 1972). Further, respondent's argument that, if a terrorist act constitutes an "accident" for purposes of article 17 so must "an innocent passenger's loss of hearing" is a non sequitur. Brief in Opposition 9-10. Liability for injuries resulting from terrorism and sabotage have been specifically discussed by the Warsaw signatories who have expressed their intent that such injuries be covered. *See* 351 F. Supp. at 707; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 593-95 (1967). This history, not some vague policy of "passenger protection" or "accident cost allocation", underlies *Husserl* and its progeny.

The brief in opposition draws analogies between respondent and a plaintiff with an "eggshell skull" or a person wrongfully killed who had a large income. Respondent also makes much of the notice requirements for the Convention's liability limitations and finds them somehow analogous to a drug manufacturer's duty to warn consumers of idiosyncratic drug reactions. Such comparisons are irrelevant to the questions presented by the petition which concern the prerequisites for liability rather than the scope of potential damages.

Respondent dwells on these unrelated matters because the liability regime imposed upon international air carriers by the decision below is without precedent in American jurisprudence.[8] Even where strict liability applies, "the defendant's duty to insure safety extends only to certain consequences." W. Prosser, *Law of Torts* § 79 at 517 (4th ed. 1971). Under article 17 of the Warsaw Convention, liability extends only to the consequences of an "accident". The decision below, by finding an accident from the fact of an injury, negates a fundamental condition on the duty of international air carriers to their passengers and converts carriers into insurers of their passengers' health.

---

[8]Where a claim against a common carrier by air for passenger injury is not predicated on the Convention or some special statute, it is determined by general principles of tort law. Under these principles, the liability of the carrier depends upon negligence, although the standard of care imposed is a high one. 1 Shawcross & Beaumont *Air Law* VII (84) (4th ed. 1964); G. Miller, *Liability in International Air Transport* 52 (1977). Prior to the decision below, no case of which petitioner is aware has ever imposed air carrier liability for passenger injury without a showing that some standard of care had been breached.

CONCLUSION

Certiorari should be granted to resolve the conflict among the Circuits concerning the construction of the Convention by answering this fundamental question of the prerequisite for carrier liability.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Any colorable claim that there is no conflict among the Circuits on the proper construction of the Warsaw Convention's fundamental liability provision has been laid to rest by the Third Circuit's very recent decision in *Abramson v. Japan Airlines*, 739 F.2d 130 (3d Cir. 1984). In *Abramson*, the court held that aggravation of a hernia "in the course of a routine normal flight should not be considered an 'accident' within the meaning of Article 17," and therefore denied the plaintiff's Warsaw Convention claim. *Id.* at 133. The court relied upon its previous interpretation of the correct legal standard in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), and rejected plaintiff's argument based on the Ninth Circuit decision now before this Court. *Id.* at 132-33. With

the decision in *Abramson*, the Third Circuit and the Ninth Circuit have now each explicitly considered and rejected the other's analysis of this important and recurring legal question.

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AMICUS CURIAE

BRIEF

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No. 83-1785 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR FRANCE,

Petitioner,

—against—

VALERIE HERMIEN SAKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF AMICUS CURIAE OF INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1785

AIR FRANCE,

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—against—

VALERIE HERMIEN SAKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

The International Air Transport Association ("IATA") respectfully moves this Court for leave to file a Brief Amicus Curiae in support of Petitioner in the within matter, on the following grounds:

1. IATA is an organization of 135 international air carriers, including substantially all of the scheduled international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention. A list of the IATA members is annexed hereto as the Appendix to the accompanying Brief.

2. Counsel for petitioner has consented to the filing of the IATA amicus brief. However, counsel for respondent has declined to consent.

3. The interest of IATA in this case arises from the fact that a very large number of IATA's member carriers transport passengers to and from the United States and are subject to litigation in U.S. courts. There have been, and will be, numerous law suits in U.S. courts against IATA members in which provisions of the Warsaw Convention, specifically Article 17, will be interpreted. IATA members will be adversely affected should the decision of the United States Court of Appeals for the Ninth Circuit in the instant case be affirmed. Therefore, IATA seeks to file this Brief Amicus Curiae in support of petitioner.

4. IATA desires to file a Brief Amicus Curiae in support of petitioner in this case in order to place before this Court the views and intent of its members, the majority of whom are parties to the Montreal Agreement and have an unsurpassed collective experience in dealing with the legal and practical issues arising out of air carriage under the Convention and the Agreement.

5. IATA also desires to file a Brief Amicus Curiae in order to place before this Court the views and intent expressed by the drafters of the Guatemala City Protocol, which was the only significant effort to modify Article 17 of the Warsaw Convention; IATA was a participant in the conference that negotiated the Guatemala City Protocol.

6. IATA is in a unique and important position with respect to the issues raised in this case and believes that the parties hereto will not be able to fully and adequately address these issues and the practical ramifications of their resolution by this Court.

7. The proposed Brief Amicus Curiae is submitted herewith.

WHEREFORE, IATA prays the Court to grant leave to file the within Brief Amicus Curiae.

Respectfully submitted,

/s/ RANDAL R. CRAFT, JR.
Randal R. Craft, Jr.
Counsel for International Air Transport Association

November 15, 1984

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1785

AIR FRANCE,

Petitioner,

—against—

VALERIE HERMIEN SAKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF INTERNATIONAL AIR TRANSPORT ASSOCIATION

STATEMENT OF INTEREST

The International Air Transport Association (IATA) is an organization of 135 international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention.[1] A list of IATA members, eleven of which are U.S. airlines, is set forth in the Appendix hereto.[2]

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1 All references to "Warsaw Convention" or "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1934, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

2 The purposes of IATA and its member airlines are (1) to promote safe, regular, and economical air transportation for the benefit of the

Because a large number of IATA's member carriers transport passengers to and from the United States and are subject to litigation in U.S courts, they are vitally affected by the decision below. IATA's member carriers carry on their day-to-day business in reliance upon the Convention framework, and they and their respective governments depend upon the proper interpretation of its provisions by United States courts. The Convention greatly facilitates international air commerce and establishes uniform and predictable criteria important to the conduct of business in international air transportation. The judicial expansion of the liability provisions will adversely affect IATA's members in their conduct of international air commerce. Moreover, as explained in the preceding motion, IATA is in a unique and important position with respect to the issues raised in this case.

SUMMARY OF ARGUMENT

I. The parties to the Warsaw Convention and the Montreal Agreement intend that international air carriers be liable for passenger injuries only if the requirements of the Convention's Article 17 are met, that is, only if the injuries are caused by an accident. In concluding that in situations such as in the present case an air carrier's liability is "absolute," the Court of Appeals (1) has misread the language of the Convention and the Montreal Agreement, (2) has ignored and interfered with the intentions of the parties as revealed not only in the language of these documents but also in subsequent negotiations, (3) has improperly injected the judiciary into the delicate process of negotiating modifications to the Convention framework, and (4) has misconceived the practical ramification of its holding.

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peoples of the world, to foster air commerce, and to study problems connected therewith; (2) to provide a means of collaboration among air transportation enterprises engaged in international air transport and services; and (3) to cooperation with the International Civil Aviation Organization (ICAO), an arm of the United Nations, and other international organizations.

A. The Montreal Agreement, a private contractual agreement, by its terms has an effect on only two articles of the Warsaw Convention, not including Article 17. The Agreement did not intend to change the scope of air carriers' liability under Article 17, and there is nothing in the Agreement to suggest otherwise.

B. As a critical part of the delicate balance of liability provisions in the Convention, Article 17 makes the carrier presumptively liable only for damages caused by an "accident." Contrary to the view of the Court of Appeals, the language of Article 17 makes it plain that the accident must cause the injury; the injury cannot itself be the requisite accident.

The holding of the Court of Appeals has rendered the word "accident" meaningless and inoperative. The word "accident" was deliberately chosen by the drafters and must be given its intended meaning, a meaning different from that of the word "occurrence" that the drafters chose to use in a similar context in Article 18.

Subsequent negotiations among the Convention's parties show the significance of the requirement that there be an accident that causes the injury. In the 1971 Guatemala City Protocol Conference, the majority of the parties agreed, over substantial opposition, to draft the Protocol so as to eliminate the requirement of an accident and to create a more absolute liability, but only in return for additional defenses and limitations. This Protocol has not yet been adopted by the United States (and is not applicable anywhere else), but the Court of Appeals has, in effect, amended the Convention to make a part of the pending Protocol applicable in this case. Aside from frustrating the intent of the parties and undermining the Convention's uniformity, the holding below is an improper intrusion into the realm of the political branches of the U.S. Government.

C. The Court of Appeals' decision, instead of making practical sense, will force the allocation of costs not to more legitimate claims but to the defense against questionable claims, which defense is made more difficult by the decision below. International air carriers will be said to be absolutely liable even where the only "injury" is fright or emotional distress alleged to have occurred during a routine, normal flight. Indeed, the decision below will encourage baseless litigation.

ARGUMENT

I. The Parties to the Warsaw Convention and the Montreal Agreement Intend that International Air Carriers Be Liable for Passenger Injuries Only if the Injuries Are Caused by an Accident.

While the Court of Appeals purported to follow the language of Article 17 of the Warsaw Convention, it in fact not only ignored the clear meaning of that language but also ignored the clear intent of the parties to the Convention and to the Montreal Agreement. This *amicus curiae* brief is no place to set forth all of the arguments and authorities that show the decision below to be erroneous. However, IATA represents virtually all of the major carriers who are signatories to the Montreal Agreement, and IATA has been intimately involved with the diplomatic negotiations concerning the Warsaw Convention and its progeny. IATA is submitting this brief in order to show that the holding below constitutes an improper interpretation of the Agreement and the Convention and robs the Convention of its requisite uniformity.

A. The Montreal Agreement Does Not Change the Scope of Air Carriers' Liability under Article 17 of the Convention.

Under the view of the Court of Appeals, an air carrier's liability in situations such as the one at bar is "absolute." The Court of Appeals claims to find support for its holding in the

Montreal Agreement,[3] a private contractual agreement. To be sure, many judges and commentators have occasionally described an air carrier's liability under the Convention as modified by the Montreal Agreement as being "absolute" or "strict". However, closer analysis will reveal that an international air carrier's liability is "absolute" or "strict" only in certain situations. The fact of the matter is that the use of the term "absolute liability" in the context of this case to describe an international air carrier's liability under the Montreal Agreement is demonstrably incorrect.

According to its terms, the Montreal Agreement unquestionably has an effect on only two articles of the Warsaw Convention: Article 22(1), which provides for the monetary limitation on damages, and Article 20(1), which allows an air carrier to avoid liability if it can prove that it had taken all necessary measures to avoid the damage or that it was impossible for it to have taken such measures. The Montreal Agreement was not intended to have, and by its terms did not have, any effect whatsoever on the defenses available to the carrier under Article 17 and Article 21. (Article 21 provides for a defense based upon the passenger's contributory negligence.) Thus, unless one takes them as shorthand oversimplifications not referring to situations such as the one in the present case, comments about a so-called absolute liability under the Montreal Agreement are quite obviously erroneous. The parties to the Montreal Agreement did not intend to change the scope of their liability under Article 17, and there is nothing in the Montreal Agreement to suggest otherwise. Therefore, the decision below is contrary to the intention of the parties to the Montreal Agreement.

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3 Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, reprinted in the Appendix to the Certiorari Petition at 24a, approved by order E-28680, 31 Fed. Reg. 7302 (May 13, 1966).

B. Article 17 of the Warsaw Convention Requires an "Accident"; an Injury Cannot Itself be the Accident.

The Warsaw Convention is a treaty adhered to by more than 120 nations.[4] It was signed by the original parties in 1929 and has been continuously adhered to by the United States since 1934.[5]

The principal purpose of the framers of the Convention was to establish a uniform body of world-wide rules relating to, and limiting liability for, carriage of passengers and cargo in international air transportation. The Convention establishes a relatively predictable, reliable, and consistent basis for resolving liability and damage disputes arising from such transportation. *Inter alia*, the carrier is made presumptively liable for injuries to passengers, and the *quid pro quo* is that the carrier is liable only for damages caused by an "accident" and is (except when there is willful misconduct) liable only up to the monetary limitation of its liability under Article 22(1) of the Convention.[6] The Convention provides that all such claims arising under its provisions can only be brought subject to its provisions (Article 24). It also establishes the jurisdictions where claims may be adjudicated (Article 28).

These provisions were, therefore, negotiated as a balanced package,[7] and a critical part of the package was Article 17, the provision limiting the nature of the damages covered.

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4 *Trans World Airlines, Inc. v. Franklin Mint Corp.*, ___ U.S. ___, 52 U.S.L.W. 4445, 4446 (April 17, 1984).

5 Because it is self-executing, the Convention needed no supplementary Congressional legislation to bring it into force. *Id.* at 4447.

6 *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967). *See generally Minutes, Second International Conference on Private Aeronautical Law*, Warsaw, October 4-12, 1929 (Horner & Legrez trans. 1975).

7 The importance of the balance is reflected in the Convention's reservation clause, which does not permit a country to issue any reservation except with respect to international transportation by air performed directly by the states.

Over 120 countries have agreed on the enduring need for the limitation of liability provisions described above.[8] Under any view, the contracting parties have manifested an intent to maintain the vitality of the Convention. The contracting parties of course accepted the inevitability of future modification of the agreement, but they committed themselves to make those adjustments within the Convention's basic framework.

As noted by the dissent, the majority opinion of the Court of Appeals misreads the Convention's Article 17, particularly the language making a carrier liable only for injuries suffered by a passenger as a result of an "accident" during the transportation. Contrary to the view of the Court of Appeals, the language of Article 17 makes it plain that *the accident must cause the injury; the injury cannot be the accident. See DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977).

The drafters' use of the word "accident" was not accidental. The terms of Article 17 were the subject of negotiation and were selected in order to have a desired effect.

> [T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.

Rocca v. Thompson, 223 U.S. 317, 332 (1912). Indeed, in the very next article, Article 18, the Convention's drafters chose to use, in a similar context, the word "occurrence" instead of the word "accident". The holding of the Court of Appeals ignores

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8 The United States has a special interest in seeing that these provisions are interpreted so as not to expose air carriers to questionable claims; more than those of most other countries, American businesses and passengers are heavily involved in international air commerce and are dependent upon the Convention's provisions that make this commerce practical and economical.

this distinction and thereby impermissibly amends the treaty so that Article 17 would read as if the word "occurrence" had been used in the place of the word "accident". The word "accident" is, as are all the other words of the treaty, to be given meaning, if reasonably possible, and rules of construction may not be resorted to in order to render it meaningless or inoperative. *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933); *Mason v. United States*, 260 U.S. 545, 553-54 (1923). Therefore, the plain meaning of Article 17's language, which meaning is made even more apparent by its contrast with the language of Article 18, must be seen as having controlling significance in this case. To affirm the decision of the Court of Appeals in this case would in effect eliminate the requirement of "accident" from Article 17 by rendering the term meaningless and inoperative.

Thus, by destroying the meaning of the carefully chosen and distinctive language of Article 17, the decision of the Court of Appeals conflicts with the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine v. United States*, 299 U.S. 5, 10 (1936). *See Sumitomo Shoji American, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982).[9]

Should there be any doubt that the decision below is contrary to the clear intentions of the parties to the Convention, this Court may examine the conduct of the parties subsequent to ratification of the Convention in order to ascertain the Convention's proper construction. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, ___ U.S.___, 52 U.S.L.W. 4445, 4449 (April 17, 1984); *Pigeon River Improv., Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 153-63 (1934); *Kolovrat v. Oregon*, 366 U.S. 187, 192-94 (1961). Modifications to the Convention were negotiated by the parties in connection with the Hague Protocol,[10] but the United States

9 This rule has been followed in Convention cases. *See, e.g., Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977);

10 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, 478 U.N.T.S. 371 (September 28, 1955).

did not ratify that Protocol, and, in any event, none of the Hague modifications concerned Article 17 of the Convention. The only significant effort to modify Article 17 of the Convention came in connection with the the Guatemala City Protocol,[11] which resulted from the International Conference on Air Law at Guatemala City that lasted from February 9 to March 8, 1971. An examination of the minutes of the lengthy conference[12] will quickly reveal that the parties spent much time debating the concept of absolute liability. IATA was a participant in the Conference,[13] and its delegates' understanding, as well as that of the other delegates as reflected in the comments made, was that under Article 17 of the Convention the international air carriers would not be liable for a passenger's injuries in the circumstances of the present case. The parties were not willing, and did not intend, to allow such claims under the language of Article 17. Indeed, when it was proposed that the Guatemala City Protocol should alter the language of Article 17 of the Convention so that, as revised, air carriers would be liable for a passenger's death or injury upon condition only that the *event* which caused the death or injury took place during the air transportation, this proposal met with substantial opposition. The proposal was ultimately passed and became part of the Guatemala City Protocol, Chapter I, Article IV. 1,[14] but this was part of a package agreement to increase the scope of liability under Article 17 in return for a defense based on the passenger's state of health (Art. IV. 1), which was *in*

11 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Guatemala City, 8th March 1971, reprinted in 2 Shawcross & Beaumont, *Air Law*, at A219-27 (4th ed. P. Martin, D. McClean & E. Martin 1984).

12 *Minutes of the International Conference on Air Law, Guatemala City, February–March 1971*, Vol. I, at 31-63 (International Civil Aviation Organization 1972).

13 *Id.* at xvi.

14 *Id.* at 292-93.

addition to the defense based on the passenger's own negligence (Art. VII), and also in return for a restriction on the passenger's ability to "break" the limit of liability (Art. X). Thus, the elimination of the requirement of an accident was part of a balanced compromise during diplomatic negotiations, and the drafters agreed to stricter, more absolute liability only in certain situations and only in return for a virtually unbreakable limit of liability.

What has happened in the present case is that the Court of Appeals has grafted onto the Warsaw Convention a portion of the Guatemala City Protocol, even though the Protocol has not yet been adopted by the United States (or even by the necessary number of other nations to render it applicable anywhere in the world). To make matters worse, the Court of Appeals has adopted only the most adverse part of the entire balanced package that was negotiated in the Guatemala City Protocol. Thus, the Court of Appeals has given the airlines the worst of both worlds—an increased scope of liability beyond that allowed by Article 17 of the Convention, but without the Guatemala City Protocol's restrictions relating to the passengers' health and without the Protocol's restriction on the breakability of the limit of liability. And the Court of Appeals has done this by impermissibly injecting itself into the delicate process of negotiating modifications to the Convention framework, a matter that the Constitution quite clearly delegates to the political branches of the United States Government,[15] before whom the Guatemala City Protocol is now pending.[16]

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15 U.S. Const. Art. III, § 2, cl. 1.

16 The Guatemala City Protocol is now encompassed by Montreal Protocols 3 and 4 (1975), reprinted in 2 Shawcross & Beaumont, *Air Law*, at A242-54 (4th ed. P. Martin, D. McClean & E. Martin 1984). These protocols were forwarded to the United States Senate for advice and consent on January 14, 1977. See S. Exec. Rep. No. 45, 97th Cong., First Sess., at 3-7 (1981). A vote was taken on March 8, 1983; the Senate did not at that time obtain the required two-thirds majority in favor of ratification. Fifty senators voted in favor, with forty-two against. After the vote was taken, the majority leader moved for reconsideration, and, consequently, the matter remains on the Senate calendar. 129 *Cong. Rec.* S.2279 (daily ed. March 8, 1983).

Moreover, as recognized by the dissent, the decision below undermines the uniformity that is so important to the parties to the Convention. The importance of uniformity is emphasized not only in the Convention's formal title but also in the Preamble to the Convention, which states that the Convention's purpose is to regulate "in a uniform manner the conditions of international transportation by air in respect . . . of the liability of the carrier." In this connection, it is significant that the decision below goes further than any other reported decision in expanding and, indeed, revising the language of Article 17 of the Convention.

C. The Decision Below Will Encourage Baseless Litigation and Result in an Undesirable Allocation of Costs.

The legal reasons why the holding below is erroneous are outlined above. But there are also practical considerations as well, and these can be reviewed most easily by examining the reasons the Court of Appeals gave as to why it thought absolute liability "made sense." 724 F.2d at 1387.

One reason given by the Court of Appeals in justifying absolute liability was that, while the passenger was in the airline's control, the airline could best prevent injuries from occurring. But what the Court of Appeals has glossed over is that the physical control of the aircraft is meaningless in cases such as this, where the aircraft has been operated properly in every respect. In this case there is no reason to believe that the airline could have taken any reasonable action that would have prevented injury to the passenger. Holding the airline liable under such circumstances is simply punishing the airline for safe flights that are routine and without accidents.

The Court of Appeals also justifies its holding on the ground of attractive-sounding theories of "accident cost allocation" and the prospect of "quick, less expensive settlements." The Court of Appeals is simply off-target. Perhaps the Court of Appeals' logic would be more sensible if all claims made were legitimate claims. But the Court of Appeals' holding will

expose airlines to an unlimited number of claims for injuries alleged to have occurred in the absence of any external, objectively determinable, non-routine occurrence. Rather than lowering the transactional costs or improving allocation of costs to legitimate claims, the holding below will in fact encourage baseless litigation and force the allocation of costs not to more legitimate claims but to the defense against questionable claims, which defense is made more difficult by the holding below.

In the absence of a requirement that, in addition to an injury to the passenger, there also must be an accident (some kind of objectively determinable, unexpected occurrence other than the injury itself), the claims against airlines would be limited only by the passengers' imaginations. For example, one may examine the record in *Scherer v. Pan American World Airways, Inc.*, 13 Avi. 17,929 (N.Y. Sup. Ct., N.Y. Co. 1975), *aff'd*, 54 A.D.2d 636 (Appellate Division, 1st Dept. 1976), to see how that case would have been affected by the Court of Appeals' holding in the present case. In *Scherer*, the plaintiff alleged that he developed thrombophlebitis as a result of sitting for long periods on two consecutive international flights. The plaintiff's brief in the Supreme Court of the State of New York conceded the following propositions:

> 1. He was injured by just sitting.
>
> 2. There was no external, violent event which occurred on either flight, such as a crash, nose dive, highjack or the like; the flights were smooth ones and uneventful to both plaintiff and defendants at the time.

Plaintiff's brief at page 2. The plaintiff's argument was, in pertinent part, as follows:

> The event here was the sitting on the plane . . . . True, as far as the pilot of the two planes went, there was no "event." But plaintiff was undergoing an event at that time; something was happening to his legs in the form of a stasis of his blood.

Plaintiff's brief at page 11. Under the circumstances, both the New York Supreme Court and the Appellate Division concluded that the claim did not come within the purview of Article 17 of the Convention because there was, as a matter of law, no "accident" within the plain meaning of that word.

Of course, in the present case it might be suggested that, even if the *Scherer* holding had been different, the airline could have ultimately avoided liability by successfully contesting the passenger's proof that his injuries resulted from sitting on the airplane. But devoting substantial amounts of time and money to contesting the causation issue on such claims is hardly a desirable allocation of resources. If anything, it simply diverts resources from the payment of more obviously legitimate claims.

As if the *Scherer* situation were not bad enough,[17] consider the effect of the Court of Appeals' decision where a mental "injury," by itself, is alleged to have occurred. Such injuries have been held compensable in certain limited situations,[18] but the Court of Appeals' decision will now be said to make international airlines absolutely liable for fright, mental anguish, emotional distress, and psychic injury alleged to have occurred during a routine, normal airplane flight. Such claims would be limited only by the passenger's imaginations, and the holding below foreshadows a floodtide of claims for non-physical injuries. (Even in jurisdictions where a physical manifestation is required, plaintiffs have claimed, not without success, that this manifestation may be found in the increased heart rate, sweating, dilation of pupils, increased respiration, etc. that would supposedly accompany the alleged mental distress.[19]) Again, the decision below will not avoid litigation;

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17 *See also Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984).

18 *See, e.g.,, Husseri v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1248-51 (S.D.N.Y. 1975).

19 *See, e.g., In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 18 Avi. 17,215, 17,217 (N.D. Ill. 1983).

instead, it will encourage it. And it will encourage litigation of the most doubtful kind of claims.

CONCLUSION

The Court of Appeals has misread the language of the Convention and the Montreal Agreement, has ignored and interfered with the intentions of the parties as revealed not only in the language of these documents but also in subsequent negotiations, has improperly injected the judiciary into the delicate process of negotiating modifications to the Convention framework, and has misconceived the practical ramifications of its holding. Therefore, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Counsel for Amicus Curiae
International Air Transport Association

November 15, 1984

APPENDIX

MEMBERSHIP OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AS OF OCTOBER 28, 1984

ACTIVE Members

Aer Lingus Teoranta
Aerolineas Argentinas
Aeronaves de Mexico S.A. (AEROMEXICO)
Aerovias Nacionales de Colombia S.A. (AVIANCA)
Air Afrique
Air Algerie
Air Botswana (Pty.) Ltd.
Air Burundi
Air Canada
Air France
Air Gabon
Air Guinee
Air-India
Air Malawi Limited
Air Mali
Air Malta
Air Mauritius
Air New Zealand
Air Niugini
Air Pacific
Air Tanzania Corporation
Air Tungaru Corporation
Air UK
Air Vanuatu Limited
Air Zaire
Air Zimbabwe
ALIA—The Royal Jordanian Airline (a wholly owned subsidiary of Arab Wings)
Alitalia—Linee Aeree Italiane
American Airlines Inc.
Ariana Afghan Airlines Co. Ltd.
Austrian Airlines

British Airways
British Caledonian Airways Ltd.
British Midland Airways Limited

Cameroon Airlines
Caribbean Air Cargo Company Ltd.
Ceskoslovenske Aerolinie (CSA)
Compania Mexicana de Aviacion S.A. de C.V.
Continental Air Lines, Inc.
CP Air
Crossair
Cruzeiro do Sul S.A.—Servicos Aereos
Cyprus Airways Limited

Deutsche Lufthansa A.G.
DirectAir, Inc.

Eastern Air Lines Inc.
Egyptair
El Al Israel Airlines Limited
Empresa Consolidada Cubana de Aviacion (CUBANA)
Empresa Ecuatoriana de Aviacion (ECUATORIANA)
Empresa de Transporte Aereo del Peru—AeroPeru
Ethiopian Airlines Corporation

Finnair Oy
Flying Tiger Line Inc. (a wholly owned subsidiary of Tiger International)

P.T. Garuda Indonesian Airways
Ghana Airways Corp.
Gulf Air Company G.S.C.

IBERIA, Lineas Aereas de Espana S.A.
Icelandair
Indian Airlines
Iran Air, The Airline of the Islamic Republic of Iran
Iraqi Airways

Jamahiriya Libyan Arab Airlines
Japan Air Lines Co. Limited
Jugoslovenski Aerotransport (JAT)

Kenya Airways Ltd.
KLM Royal Dutch Airlines
Kuwait Airways Corporation

Lesotho Airways Corporation
LAM—Linhas Aereas de Mocambique
Linea Aerea del Cobre Ltda. (LADECO)
Linea Aerea Nacional de Chile (LAN-CHILE)
Lineas Aereas Costarricenses S.A. (LACSA)
Lloyd Aereo Boliviano S.A. (LAB)

MALEV—Hungarian Airlines
Middle East Airlines Airliban

Nigeria Airways Limited

Olympic Airways S.A.

Pakistan International Airlines Corp.
Pan American World Airways, Inc.
Philippine Airlines Inc.
Polskie Linie Lotnicze (LOT)
Polynesian Airlines Ltd.
Primeras Lineas Uruguayas de Navegacion Aerea (PLUNA)

Qantas Airways Limited

Royal Air Maroc
Royal Swazi National Airways Corporation Ltd.

SABENA (Societe anonyme belge d'exploitation de la navigation aerienne)
Saudi Arabian Airlines Corp.
Scandinavian Airlines System (SAS)
Sierra Leone Airlines Limited
Solomon Islands Airways Limited (SOLAIR)
Somali Airlines
South African Airways
Sudan Airways
Swiss Air Transport Co. Limited (SWISSAIR)
Syrian Arab Airlines

TAAG—Linhas Aereas de Angola (Angola Airlines)
TAP—Air Portugal
Tower Air Inc.
Trans-Mediterranean Airways S.A.R.L. (TMA)
Trans World Airlines Inc. (a wholly owned subsidiary of Trans World Corp.)
Trinidad and Tobago (BWIA International) Airways Corp.
Tunis Air
Turk Hava Yollari A.O. (Turkish Airlines)

Union de Transports Aeriens (UTA)
United Airlines

VARIG S.A. (Viacao Aerea Rio-Grandense)
Venezolana Internacional de Aviacion S.A. (VIASA)
Virgin Atlantic Airways

YEMENIA Yemen Airways

Zambia Airways Corporation Ltd.

ASSOCIATE Members

Air Liberia
Air Queensland Ltd.
Ansett Airlines of Australia (a division of Ansett Transport Industries Ltd.)
Aviacion y Comercio, S.A. (AVIACO)

Braathens S.A.F.E.

CAM Air International Inc.
Commercial Airways (Pty.) Ltd.
Connectair Airlines Inc.

Douglas Airways Pty. Limited

Eastern Provincial Airways Limited
East-West Airlines Limited

IPEC Aviation

Kendell Airlines (a division of Ansett Transport Industries Ltd.)

Mid Pacific Airlines Inc.
Mount Cook Airlines (a division of the Mount Cook Group Ltd.)

Namib Air (Pty.) Ltd.

Quebecair

TALAIR Pty. Limited
Trans Australia Airlines
Transbrasil S.A. Linhas Aereas (Trans Brasil)
Trans-Jamaican Airlines Limited

Vayudoot Limited
Viacao Aerea Sao Paulo S.A. (VASP)

AMICUS CURIAE

BRIEF

NOV 15 1984

No. 83-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR FRANCE,

Petitioner,

v.

VALERIE HERMIEN SAKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE REPUBLIC OF FRANCE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* SUPPORTING REVERSAL

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31pp

IN THE

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Petitioner,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE REPUBLIC OF FRANCE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of France hereby respectfully moves, pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, for leave to file the attached brief as *amicus curiae* in support of reversal. On October 19, 1984, counsel for the Republic of France requested the consent of counsel for petitioner and respondent to the filing of a brief by the Republic of France as *amicus curiae*. On October 22, 1984, counsel for petitioner consented. On October 26, 1984, counsel for respondent refused.

This case presents a substantial question of recurring importance and vital interest to all Warsaw Convention parties regarding the enforceability in the United States' courts of key provisions of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, universally known as the "Warsaw Convention," October 29, 1934, 49 Stat. 3000 (*reprinted in* 49 U.S.C. § 1502 note), T.S. No. 876, 137 L.N.T.S. 11, as supplemented by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, universally known as the "Montreal Agreement," Agreement CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966). The Republic of France was the first Government to promote an international agreement regulating the liability of international air carriers. Due in large part to its efforts, the Warsaw Convention was successfully concluded in Warsaw on October 12, 1929. The French Government signed the Convention on that date and ratified it on November 15, 1932. Since the Republic of France was the guiding force behind, and an original party to the Convention, it has a continuing interest in the proper interpretation and enforcement of its provisions.

Not only is the Republic of France a party to the Warsaw Convention, but two of its commercial flag carriers, Compagnie Nationale Air France (Air France) and Union de Transports Aeriens (UTA),[1] are parties to the Montreal Agreement. These carriers transport hundreds of thousands of passengers a year

[1] The Republic of France owns approximately 98% of the common stock of Air France; UTA is privately owned.

to and from the United States and, in connection with problems arising from such transportation, are subject to litigation in American courts. Thus, the Republic of France is vitally affected by the decision below.

The overriding purpose of the framers of the Warsaw Convention was to establish a uniform body of worldwide rules relating to the carriage of passengers (and cargo) in international air transportation and a reliable and predictable basis for resolving liability and damage disputes arising from such transportation. Accordingly, the parties to the Convention and the Republic of France's commercial carriers depend upon the good faith enforcement of the Convention's provisions by the United States.

The Republic of France and the other parties to the Warsaw Convention intended to make an international air carrier presumptively liable for the death of or injury to a passenger that is proximately caused by an accident. However, they did not intend to guarantee the health and safety of a carrier's passengers nor to make a carrier responsible for injuries caused by the normal operation of the aircraft. The contrary conclusion of the Court of Appeals for the Ninth Circuit has amended Article 17 of the Convention, a pivotal article that requires something more than the usual operation of an aircraft before an air carrier may be held liable for the death of or injury to a passenger. The judicial nullification of this important and vital liability precondition will create uncertainty in international air commerce and adversely affect the Republic of France, other parties to the Warsaw Convention and their commercial carriers.

Petitioner and respondent both basically confined their arguments in the court of appeals to the specific issues arising from the facts of the case, without a detailed discussion of treaty interpretation. Since it is likely that petitioner and respondent may pursue the same course in this Court, the Republic of France respectfully requests permission to file a brief as *amicus curiae* that will contain a complete argument as to the interpretation of the Warsaw Convention by a party to that Convention. We believe that the brief of the Republic of France will be helpful to the Court's consideration of the issues raised in this case.

Respectfully submitted,

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November 15, 1984

QUESTIONS PRESENTED

The questions that the Republic of France will address are:

1. Whether the court of appeals disregarded the intent of the parties to the Warsaw Convention by declaring that international air carriers may be liable for the death of or injury to a passenger proximately caused by the carriers' normal operations.

2. Whether the court of appeals has improperly interfered with the political branches' conduct of foreign relations.

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* SUPPORTING REVERSAL

INTEREST OF THE REPUBLIC OF FRANCE

This case presents a substantial question of recurring importance and vital interest respecting the enforceability in the United States' courts of key provisions of the Warsaw Convention,[1] as supplemented by

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 29, 1934, 49 Stat. 3000 (*reprinted in* 49 U.S.C. § 1502 note), T.S. No. 876, 137 L.N.T.S. 11.

the Montreal Agreement.[2] Not only is the Republic of France a party to the Warsaw Convention, but two of its commercial flag carriers (Compagnie Nationale Air France and Union de Transports Aeriens (UTA))[3] are parties to the Montreal Agreement. These carriers transport hundreds of thousands of passengers a year to and from the United States and, in connection with problems arising from such transportation, are subject to litigation in American courts. Thus, the Republic of France is vitally affected by the decision below, Pet. App. 1a, 724 F.2d 1383 (9th Cir. 1984).[4]

The Republic of France was the first Government to promote an international agreement regulating the liability of international air carriers[5] and, due in large

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966).

[3] The Republic of France owns 38% of the common stock of Air France; the common stock of UTA is privately owned.

[4] "Pet. App." denotes the appendix to the Petition For Writ of Certiorari.

[5] Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. 27, 27 (1932); *Minutes, Second International Conference on Private Aeronautical Law, Warsaw, October 4-12, 1929* (R. Horner & D. Legrez trans. 1975). The first international conference on air law was convened in Paris on October 27, 1925, due to the efforts of the French Government, in particular the French Premier, M. Poincare. The major accomplishment of the conference was the creation of the Comite International Technique d'Experts Juridiques Aeriens (C.I.T.E.J.A.). C.I.T.E.J.A. held its first conference in 1926, followed by a second in 1927 and a

part to its efforts, the Warsaw Convention was successfully concluded in Warsaw on October 12, 1929. The French Government signed the Convention on that date and ratified it on November 15, 1932. Since the Republic of France was the guiding force behind, and an original party to the Convention, it has a continuing interest in the proper interpretation and enforcement of its provisions.

The overriding purpose of the framers of the Warsaw Convention was to establish a uniform body of worldwide rules relating to the carriage of passengers (and cargo) in international air transportation and a reliable and predictable basis for resolving liability and damage disputes arising from such transportation. The world has not reached, nor will it ever reach, a point where cooperation among nations is not necessary to foster economic growth and prosperity. International air carriers are especially vulnerable to the vagaries of differing legal systems because, due to the speed and range of modern aircraft, their fleets cross numerous borders daily. Although the framers of the Warsaw Convention may not have foreseen jumbo jets and supersonic aircraft, they did see the need to establish uniform and predictable commercial criteria relevant to the day-to-day conduct of business in the international transportation of passengers and goods. Deviations from a uniform code in international commercial aviation matters, such as the Warsaw Conven-

third in 1928. At the third conference a draft convention on air carrier liability was approved. When the Second International Conference on Private International Air Law convened on October 4, 1929, the 1928 C.I.T.E.J.A. draft convention on air law became the Warsaw Convention.

tion established, can only have a detrimental effect upon the Republic of France and the other parties to the Convention.

Contrary to the intent of the Republic of France and the other parties to the Warsaw Convention, the court of appeals has declared, in effect, that under Article 17 of the Convention international air carriers serving the United States are guarantors of their passengers' health and safety. The court of appeals has thereby amended a pivotal article of the Convention that requires something more than the normal operation of an aircraft before an air carrier may be held liable for the death of or injury to a passenger. The judicial nullification of this important and vital liability precondition will create uncertainty in international air commerce.

STATEMENT

1. Valerie Hermien Saks, a passenger on an Air France flight from Paris to Los Angeles, brought this action to recover damages, alleging a loss of hearing in her left ear caused by normal cabin pressurization changes during landing. Pet. App. at 1a, 724 F.2d at 1383. Saks sued Air France for damages pursuant to the Warsaw Convention, as supplemented by the Montreal Agreement.

Air France moved for summary judgment, asserting that an injury caused by the normal and usual operation of its aircraft was not an "accident" within the meaning of Article 17. The district court agreed that since "nothing unusual occurred in the operation of the aircraft," there had not been an accident under

Article 17, and dismissed Saks' complaint. Pet. App. at 17a-18a.

2. The majority of the court of appeals reversed,* and held that "a showing of a malfunction or abnormality in an aircraft's operation is not a prerequisite for liability under the Warsaw Convention." Pet. App. at 2a, 724 F.2d at 1384. In particular, the majority understood that such a requirement:

> is not supported by either the language and history of the Warsaw Convention, the contractual modification of the Warsaw system known as the Montreal Agreement, or the decision of many courts, including this one, which now interpret the Convention as imposing absolute liability for injuries proximately caused by the risks inherent in air travel.

Pet. App. at 2a, 724 F.2d at 1384.'

SUMMARY OF ARGUMENT

1. The decision of the majority of the court below is contrary to what the Republic of France and the other parties to the Convention intended and conflicts with fundamental principles of treaty interpretation. The

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* Wallace, J., dissented because the majority had not "faithfully followed the text of the Warsaw Convention," Pet. App. at 11a, 724 F.2d at 1388, and had instead "chosen to create a conflict [in the circuits]." Pet. App. at 14a, 724 F.2d at 1389. Judge Wallace would have affirmed the district court because "recovering for damages under Article 17 of the Convention requires more than travel or an occurrence; it requires an accident." Pet. App. at 15a, 724 F.2d at 1390.

' The further fact-finding necessitated by the majority's decision will require the district court to consider whether the aircraft's normal depressurization caused Saks' ear damage.

Republic of France respectfully submits this brief to demonstrate that the intent of the parties to the Convention, as evidenced by the text and purposes of the Convention and the subsequent conduct of the parties, requires reversal.

Under the Convention, international air carriers were not made guarantors of their passengers' health or safety. Instead the Convention only created a presumption of liability for the death of or injury to a passenger, provided that there was an "accident" that proximately caused such death or injury. An "accident," under Article 17 of the Convention, means something more than an event arising solely out of the normal operation of the aircraft, regardless of the negligence of the air carrier or the passenger. The parties have adhered to this precondition for the last 55 years. The majority's opinion does not reflect the intent of Article 17 and, in effect, amends the Convention in a way that the parties have not yet adopted.

2. The majority has improperly interfered with the United States' relations with its treaty partners and has undermined the United States' diplomatic credibility. It is up to the Executive and Legislative Branches to determine whether or not to amend a provision of a treaty. The absence of a formal amendment reveals the political branches' desire to continue enforcement of Article 17 of the Convention in its present form.

ARGUMENT

The majority's opinion has created a choice in the United States' courts between two possible definitions of the term "accident" as used in Article 17 of the

Warsaw Convention.[8] The Third Circuit has approved a definition of an Article 17 "accident" as an occurrence on board the aircraft that is "unusual or unexpected, [or] an unusual or unexpected happening." *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193, 1196-97 (3d Cir. 1978). The Ninth Circuit, in contrast, defined "accident" as "an occurrence associated with the operation of an aircraft." Pet. App. at 4a, 724 F.2d at 1385.

The Republic of France has always considered that, under Article 17 of the Warsaw Convention, an air carrier may be liable for death of or injury to a passenger only if an accident is the proximate cause of such death or injury. "Accident," as the term is used in Article 17 of the Convention, may consist of technical or mechanical problems or possibly unexpected interference by a third-party, but it excludes liability for events that arise solely out of the air carrier's normal operation of the aircraft. This rule is applicable regardless of the air carrier's negligence under Article 20(1) or the passenger's contributory negligence under Article 21 of the Warsaw Convention.[9]

Thus, the majority's opinion is contrary to what the Republic of France and other parties to the Warsaw

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[8] Article 17 provides: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

[9] *See* Statement of Gilbert Guillaume, Directeur des Affaires Juridiques du Ministere des Relations Exterieures of the Republic of France, *infra*, at A-1.

Convention intended. It is the Republic of France's purpose to urge that the majority's interpretation of the Convention should not be permitted to stand.

I. The Majority's Interpretation of the Term "Accident" Conflicts With Important Principles of Treaty Interpretation.

The fundamental principle of treaty interpretation is to ascertain the intent of the parties as evidenced by the language used, the treaty's purpose, and the subsequent conduct of the parties. *Trans World Airlines, Inc.* v. *Franklin Mint Corporation*, —— U.S. ——, 104 S. Ct. 1776, 1788 (1984) (Stevens, J., dissenting) (*"Franklin Mint"*). The majority of the court below, while paying lip service to the recognized principles of treaty interpretation, *see* Pet. App. at 2a-4a, 724 F.2d at 1384, misconstrued the parties' intent as to the meaning of "accident" in Article 17. By doing so, they reached a result that undermines a primary purpose of the Convention.[10]

A. The majority improperly ascribed a meaning to "accident" in Article 17 that conflicts with the text and purposes of the Warsaw Convention.

The point of departure in ascertaining the proper meaning of a treaty term is the language of the treaty itself.[11] *Sumitomo Shoji America, Inc.* v. *Avagliano*,

[10] The majority decision will result in a significant increase in lawsuits filed in the United States on behalf of passengers allegedly injured by normal aircraft operations.

[11] The Warsaw Convention, as a treaty, constitutes a part of the supreme law of the land. *See* U.S. Const., art. VI, cl. 2. The Convention is self-executing and, as such, no domestic legislation is required to give the Convention the force of law in the United States. *Franklin Mint*, 104 S. Ct. at 1783.

457 U.S. 176, 180 (1982). Although the Warsaw Convention does not itself define the term "accident," it is not completely silent; an analysis of its provisions shows that the parties to the Convention intended the term to have a narrower meaning than that which the majority ascribed to it.

Under Article 17, liability for death of or injury to a passenger arises after an "accident," whereas under Article 18(1) liability for loss or damage to cargo arises after an "occurrence."[12] As recognized by the dissenting judge below, this distinction is critical in interpreting the Convention. *See* Pet. App. at 11a-12a, 724 F.2d at 1388. The juxtaposition of the two terms in the two articles shows an intent on the part of the treaty framers to distinguish between an "accident" and an "occurrence."

Further, a literal reading of the text of Article 17 requires that there must be an "accident" before a carrier can be held to be presumptively liable under the Convention. Although the majority recognized this requirement (Pet. App. at 3a, 724 F.2d at 1385), the effect of their decision is to make an international air carrier presumptively liable merely from the fact that a passenger suffered bodily injury (or even discomfort),[13] a result neither intended nor canvassed by the

[12] Article 18(1) provides: "The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

[13] For example, the *Saks* decision could be used to argue that an airline is presumptively liable for a passenger's fear of flying, pain to decaying teeth arising from normal pressurization changes or similar claims, provided only that the passenger suffers some bodily injury.

parties to the Convention."[14]

Another important principle of treaty interpretation ignored by the majority is the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine* v. *United States*, 229 U.S. 5, 10 (1936); *accord Nielson* v. *Johnson*, 279 U.S. 47, 51 (1929). In accordance with this rule, international agreements must "be read in light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca* v. *Thompson*, 223 U.S. 317, 331-32 (1912).

A principal purpose of the framers of the Convention was to protect a fledgling industry by establishing a uniform body of worldwide rules relating to, and limiting liability for, carriage of passengers and cargo

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[14] The majority, in incorrectly finding the Warsaw Convention completely silent, erroneously looked to the definition of "aircraft accident" in Annex 13 to the Convention on International Civil Aviation, done at Chicago, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 ("Chicago Convention"), codified in part at 49 C.F.R. § 830.2. *See* Pet. App. at 3a-4a, 724 F.2d at 1385. Unlike the Warsaw Convention, the Chicago Convention was not concerned with the liability of air carriers for death of or injury to their passengers, a matter of private international law. It was only concerned with the rights and duties of nations in public international law matters, such as investigation of foreign aircraft accidents. *See* B. Cheng, *The Law of International Transport* 107 (1962). By its terms, Annex 13 defines "accident" for purposes of investigations under that Annex. *See* 49 C.F.R. § 830.2. Thus, as the dissenting judge below correctly concluded, the definition of "aircraft accident" in Annex 13 "has little bearing on the distinction between accidents and occurrences created by the text of the Convention itself." Pet. App. at 12a, 724 F.2d at 1388.

in international air transportation."[15] *Franklin Mint*, 104 S. Ct. at 1785. To achieve this purpose, the Convention establishes a relatively predictable and reliable basis for resolving liability and damage disputes arising from such transportation. The carrier is made presumptively liable for the death of or injury to a passenger if there has been an "accident,"[16] and the *quid pro quo* is the limitation of its liability[17] under Article 22 of the Convention.[18]

Additionally, the system of liability established by the Convention was based upon the fault of the carrier in proximately causing passenger injury. As reported

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[15] Although the airline industry has changed substantially since 1929, the rationale for the Warsaw Convention remains, particularly with respect to the need for a uniform result in commercial and legal matters.

[16] Likewise, Article 18 made the carriers' "presumptively liable for the loss of cargo." *Franklin Mint*, 104 S. Ct. at 1780.

[17] Article 20(1) of the Convention requires the carrier, to avoid liability, to show that it and its agents had taken all necessary measures to avoid the damage or that it was impossible to take such measures. A principal reason for shifting the burden of proof was the difficulty foreseen in having the passenger show the cause (as opposed to the fact) of an "accident." *See Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, S. Exec. Doc. G, 73d Cong., 2d Sess. 4 (1934).

[18] *Reed* v. *Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-500 (1967). *See generally Minutes, Second International Conference on Private Aeronautical Law*, Warsaw, *October 4-12, 1929* (R. Horner & D. Legrez trans. 1975).

by the rapporteur for the 1925 Paris preliminary conference:

> The Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third parties must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory."[10]

The majority's decision is contrary not only to the Convention's goal of protecting the fledgling airline industry, but to the fault-based system adopted by the Convention. Protection of the carrier with a fault-based system of liability implies that a carrier should only be liable if the aircraft experienced abnormal, rather than totally normal, conditions, and the abnormal conditions proximately caused the death or injury sustained by the passenger."[11] Thus, the majority's contrary conclusion disregards this fundamental purpose of the Convention, as well as the underlying legal concepts.

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[10] G. Miller, *Liability in International Air Transport* 63 (1977). A later attempt to substitute a risk theory of recovery for the fault theory was rejected. *Id.* at 64 n.3.

[11] The parties to the Convention would never have used the term "accident" in such a way as to impose liability for normal flight conditions because an air carrier cannot guard against unforeseeable harm arising out of its normal operation. This was recognized by Mr. Goodfellow of the International Union of Aviation Insurers, at the Eighth Session, Twentieth Meeting, of the ICAO Legal Committee in Madrid in 1951. *See infra* at p. 15.

B. The majority's interpretation of "accident" conflicts with the later conduct of the parties to the Warsaw Convention.

In ascertaining the proper construction of a treaty, the Judiciary is also charged to examine the conduct of the parties subsequent to ratification. *See Kolovrat* v. *Oregon*, 366 U.S. 187, 192-94 (1961); *Pigeon River Improv., Slide and Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 153-68 (1934). As recognized by this Court in *Franklin Mint*, the fact that the Warsaw Convention has "been adhered to for over half a century is a tribute not only to the framers' skills but to the signatories' manifest willingness to accept a flexible implementation of the Convention's terms" and "the conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored." 104 S. Ct. at 1786.

The parties to the Warsaw Convention intended "accident" in Article 17 to be narrower than "occurrence" in Article 18 and since 1929 the parties to the Convention have considered and consistently rejected erasing this distinction."[12]

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[12] Hitherto, United States courts that have considered the meaning of "accident" under Article 17 have consistently held that there must be an unusual or unexpected occurrence before liability can attach to an air carrier. Furthermore, there are no French cases decided under the Convention that have held a carrier liable without there having been an unexpected or unusual occurrence. *See, e.g., Judgment of May 5, 1982*, Cour de Cassation, 1982 Bull. Civ. I 138; *Judgment of April 28, 1978*, Tribunal de grande instance de Paris, 1979 R.F.D.A. 329, *reversed on other grounds, Judgment of June 19, 1979*, Cour d'appel de Paris, Premiere Chambre Civile, 1979 R.F.D.A. 327, *affirmed, Judgment of February 16, 1982*, Cour de Cassation, 1982 Bull. Civ. I 166 *(Haddad* v. *Air France)*. *See also* Rajki, *Les applications Nationales de la Convention de Varsovie*, (The National applications

1. Article 17 before the Montreal Agreement

Almost immediately following the Convention's entry into force, thought was given to revise the Convention's provisions, which work was taken up by the Legal Committeee of the International Civil Aviation Organization ("ICAO") after World War II.[28] At the Legal Committee's session in Montreal in 1949, the Committee determined to continue the Warsaw Convention's distinction between "accident" in Article 17 and "occurrence" in Article 18:

> After considerable debate, the Subcommittee decided to make reference to "accident" only in the case of carriage of passengers, and to "occurrence" only in . . . dealing with carriage of cargo or baggage. It was agreed that the term "occurrence" would be too broad, as applicable to damage sustained in the event of the death of a passenger or any bodily injury suffered by him, as this expression would cover the case of independent action among the passengers such as an attack by one passenger upon another with consequent bodily injury to the latter.

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of the Warsaw Convention), 1975 R.F.D.A. 13. This conforms to the general principles of liability in the French civil law. *Cf. Judgment of October 7, 1965*, Cour de Cassation, 1965 Bull. Civ. I 937.

The Guatemala City Protocol of 1971 would have erased the distinction between "accident" and "occurrence." However, the Protocol is not yet in force. *See* part II, *infra*.

[28] Lowenfeld and Mendelsohn, *supra* note 18, at 502. ICAO is an organization of governments established in 1947 to consider problems of international civil aviation matters. *See* Convention on International Civil Aviation, done at Chicago, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

> On the other hand, the broader term "occurrence" should be applied to damage sustained in the case of carriage of cargo or baggage, since the term would include not only an accident but also cases where nothing of a positive nature had happened. Thus, a delay in the trans-shipment of perishable goods might not necessarily be an accident, but would fall under the heading of an "occurrence."[29]

The question was again raised at the Eighth Session, Twentieth Meeting in Madrid in 1951. The Belgian delegate, Mr. Golstein, proposed to substitute the word "occurrence" ("evenement") for the word "accident," since the former term was broader and less ambiguous.[30] Mr. Goodfellow of the International Union of Aviation Insurers opposed the amendment, stating that "the proposal struck at the whole root of the convention" and was not "logical."[31] Such an amendment, he asserted, would give rise to liability, for example, every time a passenger suffered from air sickness.[32]

Although the Legal Committee at Madrid adopted the Belgian proposal,[33] Mr. Golstein reversed his posi-

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[29] ICAO Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, June 7th - June 18th, 1949*, ICAO Doc. 6027 LC/124 at 270 (1949).

[30] ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid, 11 September - 29 September 1951*, ICAO Doc. 7229-LC/133 at 136 (1951).

[31] *Id.* at 137-38. It should be noted that Mr. Nunneley of the United States also opposed the amendment. *Id.* at 138.

[32] *Id.*

[33] *Id.*

tion and opposed the change at the Ninth Session in Rio de Janeiro in 1953.[29] Mr. Beaumoont of the United Kingdom, who was also the Rapporteur, pointed out that the word "occurrence" had been used instead of "accident," to allow:

> a passenger to recover damages sustained during the course of the flight, although an accident in the strict sense of the word had not occurred. Unless the word "accident" were changed, the effect might be to deprive a passenger of his right to recover damages for injuries which he did sustain, whether or not through the negligence of the carriers.[30]

The United States delegate agreed that "[t]he danger in using the word 'occurrence' [is] that this might possibly extend the liability of the carrier to cases for which liability did not now exist."[31] Because of these arguments, the Committee voted to retain the term "accident."[32]

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[29] 1 ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August - 12 September 1953*, ICAO Doc. 7450-LC/136 at 71 (1954).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 72. The meetings and drafts concerning revisions to the Warsaw Convention eventually matured into the Protocol To Amend The Convention For The Unification of Certain Rules Relating to International Carriage By Air Signed At The Hague, Sept. 28, 1955, 478 U.N.T.S. 371, commonly known as "the Hague Protocol." The United States has never ratified this Protocol. For present purposes, it need only be pointed out that the Hague Protocol left Articles 17 and 18 of the Warsaw Convention unchanged.

Thus, the framers of the Hague Protocol considered and then rejected substitution of the term "occurrence" for "accident" in Article 17 of the Warsaw Convention. The majority, by interpreting "accident" to mean "occurrence," expressly adopted a change that the framers of the Warsaw Convention and the Hague Protocol had rejected.

2. Montreal Agreement

According to the majority opinion, the Montreal Agreement[33] demonstrates that the parties to the Warsaw Convention had adopted an "absolute" liability regime for death of or injury to a passenger without the necessity of the showing of an "accident." *See* Pet. App. at 7a-8a, 724 F.2d at 1386-87. However, the air carriers that signed the Montreal Agreement did not have the power to amend Article 17 of the Convention. *See Restatement (Second) of the Foreign Relations Law of the United States* § 155 (1965). In fact, they neither discussed nor considered such an amendment."

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[33] The Montreal Agreement was a voluntary arrangement among international air carriers serving the United States. These carriers entered into the Montreal Agreement in order to avoid the United States' formal withdrawal from the Warsaw Convention because of its dissatisfaction with the Convention's low limits of liability. *See* Lowenfeld and Mendelsohn, *supra* note 18, at 549-52. The United States had given notice of denunciation of the Warsaw Convention on November 15, 1965, to take effect six months later, but subsequently withdrew the notice of denunciation in response to, and as part of the bargain for, the Montreal Agreement. *Id.* at 549-50, 596.

[34] The arrangement agreed to by the air carriers was filed with the Civil Aeronautics Board as a tariff. Agreement CAB No. 18900, May 13, 1966. There is nothing contained in the tariff that

Amendment of Article 17 of the Convention would require formal action by the parties to the Convention under Article 41.[34] Instead, at Montreal, the participating air carriers acted under Article 22 of the Convention and agreed to raise their liability limits to $75,000 for death of or injury to a passenger;[35] and in order to facilitate settlements up to the higher limit, the carriers agreed to waive their due care defenses under Article 20(1) of the Convention.[36]

The majority opinion undermines what the Warsaw Convention was designed to achieve; namely, a uniform body of worldwide rules and a predictable and reliable basis for resolving liability disputes arising out of international air transportation. Since the Convention is unaffected by the Montreal Agreement as to those flights and carriers not subject to the Agree-

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would even suggest that the air carriers had addressed themselves to "accident" in Article 17 or that they considered themselves to be "absolutely" liable for injury to a passenger without a showing of an "accident."

[34] *See* the discussion concerning the Guatemala City Protocol, part I.B.3 *infra*, wherein the parties to the Warsaw Convention, not their flag carriers, proposed formal amendment to the Convention.

[35] Article 22(1) of the Warsaw Convention expressly provides that the liability limitation for personal injury or death to a passenger may be raised by "special contract" between the carrier and the passenger.

[36] Contrary to the majority's opinion, Pet. App. at 4a, 724 F.2d at 1385, "accident" is not "in essence a restatement of the defense of due care." In fact, due care is still an issue in willful misconduct allegations under Article 25 of the Convention. Regardless of whether the air carrier has been negligent, "accident" remains the precondition to liability under Article 17.

ment, under the majority's decision, an air carrier's liability for normal operation of its aircraft will now vary depending on the passenger's contract of carriage."

Even though an air carrier's liability under the Warsaw Convention, as supplemented by the Montreal Agreement, has been widely described as "absolute," that was neither the intention of the parties to the Warsaw Convention nor is it the effect of the Montreal Agreement. The description of liability as "absolute" is inconsistent with the liability regime after the Montreal Agreement; namely that the liability of an international air carrier, servicing the United States, is limited to $75,000 (Article 22, as supplemented by the Montreal Agreement), if the damage was proximately caused by an accident (Article 17),[37] and was not "caused by or contributed to by the negligence of the injured [passenger]" (Article 21).

3. Article 17 after the Montreal Agreement

The Montreal Agreement was intended to be a transitional solution until the parties to the Warsaw Con-

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[37] For example, an international air carier, such as Air France, will be liable in United States courts for its normal operations if the injury sustained by the passenger occurred on a London-Paris leg of a flight originating in the United States, but will not be liable for the same injury to a different passenger on the same flight if the second passenger's trip originated in London and terminated in Paris.

[38] For an analogy, see *Schneider v. Lockheed Aircraft Corporation*, 658 F.2d 835, 857 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982) (a non-Warsaw Convention case where proximate cause remained a significant issue even though responsibility for the accident was not contested).

vention could conclude a new or revised treaty."[39] Consequently, the ICAO held meetings from 1966 to 1970 that ultimately led to a conference in Guatemala City to consider amendments to the Warsaw Convention. The result of this conference was the Guatemala City Protocol.[40] The amendment to Article 17 proposed in the Guatemala City Protocol and the debate about the proposed amendment demonstrate that the parties to the Warsaw Convention did not understand the Montreal Agreement to have amended the concept of "accident" in Article 17.

The revised Article 17 would have provided:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon proof only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the infirmity of the passenger.

This revision to Article 17 was adopted by ICAO's Legal Committee on February 24, 1970.[41] In the final debate before adoption by the ICAO delegates, it was pointed out that the word "event" had been substituted for "accident," thus broadening the Article's scope.

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[39] Civil Aeronautics Board Order E-23680, May 13, 1966.

[40] The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, Guatemala City, 8 March 1971, *reprinted in* A. Lowenfeld, *Aviation Law* 975-84 (2d ed. Doc. Supp. 1981).

[41] *Minutes of Twentieth Meeting*, Agenda Item 3, ICAO Doc. 8878-LC/162 at 192 (1970).

Also, in order to limit the coverage to carriage-related incidents, a sentence had been added that excluded death or injury resulting solely from the infirmity of the passenger." The chairman of the drafting group of the Committee explained that "a carrier might be held liable for other acts which could not be considered as accidents and, therefore, the Legal Committee and its Drafting Committee found that the word 'accident' was too narrow."[42]

During the debate, the Italian delegation proposed that the term "accident" be retained in order "to make it clear that the objective liability would be engaged only in the case of an abnormal event directly connected with air transport operations."[43] Supporters of the change, however, found the term "accident" too restrictive,[44] and the changes to Article 17 were approved.[45]

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[42] *Id.* at 187-92.

[43] 1 ICAO, *Minutes, International Conference on Air Law, Guatemala City, February-March 1971*, ICAO Doc. 9040-LC/167-1 at 34 [hereinafter, *Minutes*].

[44] *Id.* at 44.

[45] See *id.* at 34, 36, 38.

[46] For the official text, see ICAO Doc. 8865 LC/159, Part III Annex C at 48 (1970). During the course of the debate, the Delegate from the United Kingdom stated that his Government could accept the principle of absolute liability and then addressed himself to whether, under the revised Article 17, air carriers would be liable for such injuries brought about by fright from sudden severe turbulence. He stated that with "regard to the example which the Delegate of New Zealand gave, of the passenger with a weak heart whose death was precipitated by clear air turbulence, his Delegation felt that the airline should carry the respon-

Thus, even after the Montreal Agreement, the parties to the Warsaw Convention understood that an accident was a precondition to an air carrier's liability for death of or injury to a passenger. They also understood that the terms "occurrence" and "event" are broader than the term "accident" and that an amendment of Article 17 was necessary if liability was to be imposed for death or injury resulting from an "event." Thus, the majority implemented, by declaring that Air France may be liable to Saks for injuries arising out of its normal flight operations, what the parties to the Warsaw Convention and Guatemala City Protocol had only proposed but had not adopted.

II. The Ninth Circuit Has Improperly Interfered With The Political Branches' Conduct of Foreign Relations

The Republic of France understands that the United States Constitution reserves to the Executive Branch the power to negotiate, make and amend treaties, with the advice and consent of the Senate. The Executive and Legislative Branches are considered to be in a better position than the Judiciary to assess the need to amend a treaty. Indeed, the primacy of the political branches in the conduct of the United States' foreign relations has always been a cornerstone of the Judiciary's self-restraint. The majority, however, unilaterally took precisely the action that the political branches have yet to take; namely, amending Article 17 of the

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sibility in border-line cases." *Minutes*, *supra* note 43, at 32. This view was supported by the United States, *see* id. at 33, and several other delegations.

Warsaw Convention to reflect the changes proposed by the parties to the Guatemala City Protocol."

The United States is regarded as an important party to the Convention because of the relative size of its aviation industry and its large international air traffic. However, as this Court noted in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the day is long past when our courts can adhere to the "parochial concept" that "trade and commerce in world markets and international waters [be] exclusively on our own

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[47] In February 1975, Montreal Protocols 3 and 4, which encompass the Guatemala City Protocol, were drafted. Protocols 3 and 4 call for absolute and unbreakable limits of liability (liability without fault) of 1,500,000 Poincare francs for passenger injury or death and 15,000 francs for loss of or damage to baggage. Montreal Protocols 3 and 4, when in force, will establish Special Drawing Rights (SDRs) as the unit of conversion for Poincare francs in Article 22(4) of the Convention. They will also raise the limit of liability for death or injury to 100,000 SDRs (approximately $105,000 today) and provide for individual nation's establishment of a Supplemental Compensation Plan for passenger death or injury. The United States, through the Executive Branch, was a principal architect in the formulation of these protocols, and it signed them in 1975. They were forwarded to the United States Senate for advice and consent on January 14, 1977. *See Message from the President of the United States Transmitting Two Related Protocols done at Montreal on September 25, 1975*, S. Doc. Exec. B, 95th Cong., 1st Sess., and reported favorably by the Senate Committee on Foreign Relations, *see* S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981). A vote was taken on March 8, 1983, but at that time the required two-thirds majority of the Senate was not obtained in favor of ratification. *See Franklin Mint*, 104 S. Ct. at 1782, *citing* 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983). For a further description of these events, see Dubuc and Doctor, *Legislative Developments Affecting the Aviation Industry 1981-1982*, 48 J. Air L. & Com. 263, 268-71 (1983).

terms, governed by our law, and resolved in our courts." *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

Also, as stated in *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915), *quoted in United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936), United States courts "should hesitate long before limiting or embarrassing" the sovereign powers of the United States, particularly as they concern foreign affairs. However, the majority's decision may have the effect of isolating the United States from its treaty partners and placing in doubt whether the United States "speaks with one voice" with respect to foreign affairs. *Cf. Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979); *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752-53 (1978); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976).

The Republic of France respectfully submits that amending by judicial fiat a critical and pivotal part of the Convention will adversely affect the perceptions of other nations of the United States' initiatives and commitments in negotiations for modernization of the Convention and, indeed, in other international negotiations. If the majority's opinion is allowed to stand, it will vitiate the long-standing commitment of the United States, as stated many years ago by the Roosevelt Administration, to give full, "good faith" observance to the Warsaw Convention.[46]

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[46] Proclamation of President Franklin D. Roosevelt declaring the United States' adherence to the Warsaw Convention. 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934).

CONCLUSION

For the foregoing reasons, the Republic of France respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

STATEMENT

I am Directeur des Affaires Juridiques du Ministere des Relations Exterieures of the Republic of France. One of my functions is to be familiar with my Government's past and present positions with respect to treaties to which it is a party. This statement is made on behalf of the Republic of France in support of the *amicus curiae* brief we have instructed our United States counsel to formulate and file.

Since the Republic of France ratified the Warsaw Convention on November 15, 1932, the Republic of France has always considered that, under Article 17 of the Warsaw Convention, an air carrier may be liable for death of or injury to passengers only in case of an accident which is the proximate cause of death or injury to such passengers. "Accident," as the term is used in Article 17 of the Convention, may consist of technical or mechanical problems or possibly unexpected interference of a third-party, but it excludes liability for events which arise solely out of the air carriers' normal operation of the aircraft. This rule is applicable regardless of the air carriers' negligence under Article 20(1) or the passengers' contributory negligence under Article 21 of the Warsaw Convention.

It is the Republic of France's express hope that the *amicus* brief and this statement will assist the Justices of the Supreme Court in the case pending before them.

Dated: 13th November 1984.

Signed: Gilbert Guillaume

PETITIONER'S

BRIEF

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does the Warsaw Convention impose liability upon international airlines for events which are neither unusual nor unexpected, such as the routine, necessary repressurization of an aircraft cabin?

2. Did the decision below abrogate a treaty provision by permitting a passenger to maintain an action against a carrier for illness or injury occurring on board an aircraft without first satisfying the Warsaw Convention's threshold requirement of showing that an accident occurred?

3. Did the Montreal Agreement, a private agreement among international airlines, modify the Warsaw Convention to make international carriers the insurers of their passengers against any illness or injury occurring in the course of aircraft operations?

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AIR FRANCE,
Petitioner,

vs.

VALERIE HERMIEN SAKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER AIR FRANCE

Petitioner Air France[1] respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals, reported at 724 F.2d 1383 (9th Cir. 1984), is reprinted in the appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The order of the district court, which is unreported, is reprinted there at 16a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 31, 1984. The petition for a writ of certiorari was filed on April 30, 1984, and was

[1] In response to Rule 28.1, Petitioner Air France states that it has the following subsidiaries: Air Charter, Jet Chandler International, Societe des Hotels Meridien, Servair, Societe Immobiliere Aeroportuaire (SIA), Sodetaire, Sotaire, Tourisme France International.

granted on October 1, 1984. The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

TREATY INVOLVED

This case concerns the construction and purpose of the Warsaw Convention, *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 note, and, in particular, article 17 thereof. Article 17 and other related provisions of the Convention are set out at Pet. App. 20a-23a.

STATEMENT OF THE CASE

Respondent Valerie Hermien Saks, a passenger on an Air France flight from Paris to Los Angeles, brought an action for damages, alleging a total loss of hearing in one ear as a result of cabin pressurization changes.[2] In response to Air France's motion for summary judgment, respondent conceded that the cabin pressurization system functioned normally in all respects. JA 29; *see* JA 26-27. Her action was dismissed because she could not show that an "accident" had occurred within the meaning of article 17 of the Warsaw Convention. Pet. App. 17a-18a. The court below reversed because it found that the Montreal Agreement, a private agreement of international air carriers serving the United States, modified the Convention to make the

[2]For purposes of summary judgment Air France necessarily assumed that cabin pressurization changes were the cause of respondent's hearing problems. There was, however, evidence to the contrary. During the flight, respondent made no complaint to the flight crew. Joint Appendix 23 (hereinafter "JA"). Nor did other passengers complain to the crew of any physical discomfort in their head, sinuses or ears. JA 26. Respondent testified that she did not discover her hearing loss until the day after the flight and that she did not seek medical care until five days after the flight. JA 24.

carriers' liability "absolute" for injuries occurring on board aircraft. Pet. App. 7a, 724 F.2d at 1386.

The Warsaw Convention. The Convention is a multilateral treaty governing international aviation to which more than 120 nations, including the United States and France, now adhere. Its significance to international aviation as well as its importance within the multilateral treaty system is beyond dispute. The Convention's primary purposes are to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *See Trans World Airlines v. Franklin Mint Corp.*, ___ U.S. ___, 80 L.Ed. 2d 273, 278 (1984).[3]

The Convention limits carrier liability in two ways. First, it imposes ceilings on carrier liability for property loss and personal injury damages. *See* article 22, Pet. App. 21a. Second, it adopts uniform preconditions for carrier liability under the Convention. *See* articles 17-21, Pet. App. 20a-21a.

Last term, in *Trans World Airlines v. Franklin Mint Corp.*, the Court overturned a decision of the Second Circuit which, ostensibly acting on grounds of public policy, had abrogated the Convention's liability ceiling. The matter now before the Court concerns a decision in which the Ninth Circuit, also purporting to act on policy grounds, has in effect abolished the fundamental pre-

[3]*See also* In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982); Reed v. Wiser, 555 F.2d 1079, 1089-90 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); Block v. Compagnie Nationale Air France, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967).

condition for carrier liability for personal injury—the requirement that an "accident" be shown to have occurred.

This controversy focuses upon the proper construction of article 17 of the Convention. Article 17 creates a presumption of carrier liability for passenger injury "if the accident which caused the damage so sustained took place on board the aircraft."[3] The carrier can be relieved of liability by showing that it had "taken all necessary measures to avoid the damage" or that it was impossible to do so. Article 20(1), Pet. App. 21a.[4] The Convention also permits a defense of contributory negligence. Article 21, Pet. App. 21a. The decision below has broken with previous authority by construing the term "accident" in article 17 as any "occurrence associated with the operation of an aircraft." Pet. App. 3a-4a, 724 F.2d at 1385.

The Montreal Agreement. On November 15, 1965, the United States gave notice of denunciation of the Convention because of dissatisfaction with the Convention's

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[3]In transmitting the Convention to the Senate, the Secretary of State explained:

> The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation. [Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 4 (1934) (letter from Secretary of State Cordell Hull transmitting the Convention to the Senate for adherence) *quoted in* Lowenfeld & Mendelsohn, 80 Harv. L. Rev. at 500.]

[4]The drafting history of article 20 makes clear that it was intended to embody the common law concept of "due diligence" or "due care". G. Miller, *Liability in International Air Transport* 66-67 (1977).

low limits of liability for personal injury or death to passengers. 31 Fed. Reg. 7302 (1966), Pet. App. 27a. At a subsequent special meeting of the International Civil Aviation Organization in Montreal, revisions to the Convention were discussed but no agreement reached.[5] To avoid U.S. withdrawal from the Warsaw system, the major international carriers, at the urging of the State Department, entered into a voluntary arrangement increasing their liability limits for flights serving the United States. This arrangement became known as the "Montreal Agreement".[6]

Article 22(1) of the Convention originally placed a ceiling on carrier liability for personal injury or death of approximately $8,300 per passenger, but permits this ceiling to be raised by "special contract" between the carrier and the passenger. In the Montreal Agreement, the parties agree to include within their conditions of carriage and tariffs a provision, constituting a "special contract" in accordance with article 22(1), raising the

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[5]*See* International Civil Aviation Organization, *Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol, Montreal, 1-15 February 1966*, volume I, *Minutes* (Doc. 8584-LC/154-1) (1966), volume II, *Documents* (Doc. 8584-LC/154-2) (1966).

[6]The Montreal Agreement was filed with and approved by the Civil Aeronautics Board pursuant to section 412 of the Federal Aviation Act of 1958, 42 U.S.C. § 1382. *See* Pet. App. 27a-31a, 31 Fed. Reg. 7302 (1966). Petitioner Air France was one of the original parties, who then carried collectively well over 90 percent of all international air traffic involving U.S. points. 54 Dep't State Bull. 955, 956 (1966). More and more carriers have executed counterparts over the years. At present there are approximately 200 signators. 1 Speiser & Krause, Aviation Tort Law § 11.19, at 676-78 n.27 (1978).

liability limit to $75,000 on international flights serving the United States. Pet. App. 24a. The parties further agree to include a provision waiving the right to assert the due care defense of article 20(1) in personal injury actions to which the Convention applies. *Id.* The contributory negligence defense of article 21 is left intact.[8]

The Montreal Agreement is a private contract, not a treaty. It modifies the Convention only as the terms of the Convention permit it to be modified and only in accordance with the contracting carriers' intent. The Montreal Agreement does not purport to change the scope of the Convention's application, nor was it intended to in any way alter the meaning of article 17.[9]

The Guatemala Protocol. The parties to the Warsaw Convention met in Guatemala City in 1971 and negotiated an agreement to amend the Warsaw Convention.[10] This agreement, generally referred to as "the Guatemala Protocol," has not been adhered to by the United States[11] and

[8]Day v. Trans World Airlines, 528 F.2d 31, 32 n.3 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); Mathias v. Pan-American World Airways, 53 F.R.D. 447, 449 n.4 (W.D. Pa. 1971).

[9]*See* MacDonald v. Air Canada, 439 F.2d 1402, 1405n. (1st Cir. 1971); In re Tel Aviv, 405 F. Supp. 154, 155 n.2 (D.P.R. 1975), *aff'd sub nom.* Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[10]The proceedings at Guatemala City are recorded in two documents: International Civil Aviation Organization, *International Conference on Air Law, Guatemala City, February-March 1971*, volume I, *Minutes* (Doc. 9040-LC/167-1) (1972) (hereinafter "Guatemala Minutes") and volume II, *Documents* (Doc 9040-LC/167-2) (1972) (hereinafter "Guatemala Documents").

[11]129 Cong. Rec. S2279 (Daily ed. March 8, 1983) (Senate vote declining to ratify subsequent protocols incorporating the Guatemala Protocol).

has never entered into force.[12] Its provisions and their drafting history are nonetheless instructive of the construction the parties give to the presently effective language of article 17.

Had the Guatemala Protocol entered into force, it would have made two pertinent revisions to the Convention's liability provisions. First, the due care defense of article 20(1) would be eliminated in the case of passenger injury. Second, the Guatemala Protocol would amend article 17 by substituting the phrase "the *event* which caused the death or injury" for the phrase "the *accident* which caused the damage so sustained".[13] This change in article 17 was opposed by the delegates of several nations and was the subject of much debate.[14] The parties recognized the substantive significance of the term "accident" as a condition of liability under the present treaty. The change to "event" was uniformly recognized as a significant extension of carrier liability.[15]

The proceedings below. This action commenced in state court and was properly removed to federal court.[16] When respondent could develop no evidence of malfunction in the aircraft's cabin pressurization system nor evidence of any

[12]1 Shawcross & Beaumont, *Air Law* ¶ VII (21) (4th ed. 1984).

[13]*See* Guatemala Documents 189-90.

[14]*See* Guatemala Minutes 31-47.

[15]*See Id.*

[16]Air France is an agency or instrumentality of a foreign state. *See* 28 U.S.C. §§ 1441(d), 1603.

unusual event to account for her alleged permanent hearing loss, Air France moved for summary judgment."

Relying on *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), and *Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977), the district court concluded that an ear injury caused by normal cabin pressurization changes does not constitute an "accident" covered by the Convention. Pet. App. 17a. Accordingly, Air France's motion for summary judgment was granted. *Id.* at 18a.

The Ninth Circuit reversed. It expressly rejected the analysis and conclusions of the Third Circuit on the issue as "out of step" with the Montreal Agreement and imposed "absolute liability on airlines for injuries caused by air travel." Pet. App. 10a, 724 F.2d at 1388. It held that "a showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention." Pet. App. 2a, 724 F.2d at 1384.

Judge Wallace dissented "because the majority ha[d] not faithfully followed the text of the Warsaw Convention" and had instead turned to an unrelated source for a definition of accident. Pet. App. 11a-12a, 724 F.2d at 1388. He stated:

> Recovery for damages under article 17 of the Convention requires more than travel or an occurrence; it requires an accident. Normal cabin depressurization is no accident. [Pet. App. 15a, 724 F.2d 1390.]

"Air France produced documents and an affidavit from the aircraft commander establishing that the flight was normal in all relevant respects. *See* JA 17-28. The programmed pressurization changes are necessary to the safety of passengers. *See* JA 10-11.

The dissent rejected the majority position that the Montreal Agreement had changed the carrier's duty under the Convention to make the carrier "the absolute insurer of its passengers' health". Pet. App. 13a, 724 F.2d at 1389. It urged that the Third Circuit's definition of "accident" as an "unusual or unexpected occurrence" properly construes the Convention's language. Pet. App. 13a-14a, 724 F.2d at 1389.

SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit has disregarded the language of the Warsaw Convention to impose liability for passenger injury where the Convention's fundamental prerequisite for liability, an accident, has not been satisfied. It has thereby departed from the construction of Article 17 followed uniformly by the other circuits and has substituted its policy judgment for that of the political branches of government to whom the Constitution assigns responsibility for negotiation, ratification and denunciation of treaties.

The Warsaw Convention establishes a liability system based upon the fault of the carrier in causing passenger injury, not upon the allocation of risks. Under this system, a presumption of carrier liability for an injury caused by an accident on board an aircraft is created; this presumption can be rebutted by an affirmative showing that the carrier acted with due care. Art. 20, Pet. App. 21a. In the Montreal Agreement, air carriers have agreed to waive this affirmative defense, as well as to raise the Convention's liability ceiling, in cases where the injury occurs on an

international flight serving the United States. Pet. App. 24a. Contrary to the Ninth Circuit's ruling, the Montreal Agreement does not otherwise change the Convention's liability system.

The contractual waivers agreed to by the carriers at Montreal have sometimes been said to create "absolute" liability for passenger injury. The decision below employs this vague notion to effect a radical transformation of the Convention's liability system. By ruling that the Montreal Agreement modifies the Warsaw Convention to impose "absolute liability for injuries proximately caused by the risks inherent in air travel" (Pet. App. 2a, 724 F.2d at 1324), the Ninth Circuit has effectively made air carriers insurers of their passengers' health on international flights serving the United States. The decision below thus ascribes to the Montreal Agreement legal consequences that a private agreement could not possibly have and effectively abrogates a treaty.

The language of the Convention draws a distinction between "accident" and "occurrence". The parties' subsequent construction of the Convention at Guatemala City demonstrates the significance of this distinction which the decision below has ignored. Instead, the decision below redefines the term "accident" in article 17 as "occurrence". It imports this definition from an unrelated source and justifies its application upon policy grounds concerning risk allocation.

The Third Circuit has given effect to the language of article 17 by defining "accident" as "an unusual or unexpected happening." *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d at 1197. Contrary to the suggestion of the decision below, this definition does not reimport a negligence standard to proceedings under the Convention nor undermine the elimination of the "due care" defense effected by the Montreal Agreement. Rather, it preserves the requirement of an accident and avoids imposing liability on the basis of causation alone.

ARGUMENT

I

THE DECISION BELOW DISREGARDS THE LANGUAGE OF THE CONVENTION BY REDEFINING "ACCIDENT" AS "OCCURRENCE"

The proper starting point in determining what injuries are compensable under the Warsaw system is the language of the Convention itself. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). Article 17 of the Convention creates a presumption of carrier liability for passenger injury "if the *accident* which caused the damage so sustained took place on board the aircraft." Pet. App. 20a (emphasis supplied). Courts have uniformly held that this language makes a finding that an "accident" has occurred a condition precedent to article 17 liability.[18] Although the decision below acknowledges that such a finding must be made,[19] it has effectively eliminated the requirement of an accident as a prerequisite for liability by redefining "accident" as "occurrence".

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[18] *See, e.g.*, DeMarines v. KLM Royal Dutch Airlines, 580 F.2d at 1198; McDonald v. Air Canada, 439 F.2d at 1404; Husserl v. Swiss Air Transport, 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd mem.*, 485 F.2d 1240 (2d Cir. 1973).

[19] Pet App. 3a, 724 F.2d at 1385.

A. The Language of the Convention As Well As Its Construction By the Parties Establishes a Distinction Between "Accident" and "Occurrence"

By redefining "accident" as "occurrence", the decision below obliterates a distinction rooted in the language and structure of the Convention itself. "[T]reaties . . . are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). Article 17, which governs harm to passengers, extends liability only to *accidents* injuring people. In contrast, where checked baggage is damaged, the carrier is liable "if the *occurrence* which caused the damage took place during the transportation by air." Article 18 (emphasis supplied), Pet. App. 20a. A treaty should be construed to avoid rendering any word meaningless. *Factor v. Laubenheimer* 290 U.S. 276, 303-04 (1933); *see Washington Market Co. v. Hoffman*, 101 U.S. 112, 25 L.Ed. 782, 783 (1879).

The Convention's construction at Guatemala City in 1971 further demonstrates that the Ninth Circuit's interpretation of article 17 is contrary to the understanding of the Treaty nations. "In ascertaining the meaning of a treaty [the Court] may look beyond its written words to . . . [the contracting parties'] own practical construction of it,"[10] and should consider any subsequent agreement of the parties concerning its interpretation.[11]

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[10] *Factor v. Laubenheimer*, 290 U.S. at 294-95.

[11] *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(a), *reprinted at* 63 Am. J. Int'l L. 875, 885 (1969).

The proposed amendments to article 17 negotiated at Guatemala City would have substituted the word "event" for the word "accident". The Convention's due care defense of article 20(1) was to be eliminated in the case of passenger injury.[12] The purpose of these changes was to provide strict liability for all passenger injuries, qualified only by an express exception regarding the passengers' pre-existing state of health.[13]

The 1971 deliberations of the parties show the significance that they attached to the distinction between "accident" and "event". The Guatemala Protocol's proposed changes to article 17 were presented to the Conference by the Legal Committee as recommendations. The Italian delegation urged a return to the use of the word "accident" in order "to make it clear that the objective liability would be engaged only in the case of *an abnormal event* directly connected with air transport operations."[14] Support for the Italian position was expressed by Poland, Byelorussia, and Argentina.[15] On the other hand, those supporting use of the term "event" found the term "accident" too restrictive.[16] Sweden, whose delegate had chaired the Legal Committee's drafting group, stated: "[I]t should be emphasized that a carrier might be held liable for other acts which could not be considered as accidents and, therefore, the Legal Committee and its Drafting Committee found that

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[12] Guatemala Documents 190.

[13] *See* Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 Am. J. Comp. L. 335, 337-38 (1972).

[14] Guatemala Minutes 44 (emphasis supplied).

[15] *Id.* at 34-37.

[16] *See id.* at 34, 36, 38.

the word 'accident' was too narrow."[27] At the conclusion of the debate, the Conference adopted the broader term "event."[28]

The Guatemala Protocol, however, has neither been adhered to by the United States nor has it come into force. Thus, the currently effective version of article 17 in the Convention continues to use the term "accident." This has the consequence recognized by the delegates in Guatemala City—the existence of an abnormal or unusual event remains an independent condition for carrier liability.

B. The Decision Below Redefines "Accident" as "Occurrence" on the Basis of a Definition Framed for an Entirely Different Purpose

Instead of looking to the language of the Convention or its history for a definition of the term "accident," the decision below turns to a definition in an unrelated source and holds that "accident" means "occurrence". Pet.App. 3a-4a, 724 F.2d at 1385. The definition seized upon, and misapplied, is derived from Annex 13 to the Chicago Convention.[29] Article 37 of the Chicago Convention provides that the contracting nations should collaborate to achieve

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[27] *Id.* at 34.

[28] The Conference defeated an Italian proposal to retain the word "accident" by a vote of 35 to 10. Guatemala Minutes 47. *See also Warshaw*, 442 F. Supp. at 410-12 (reviewing the Guatemala negotiations).

[29] Convention on International Civil Aviation, *done* December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295. Annex 13 has been amended several times since its adoption resulting in some minor differences, not relevant to the discussion here, between the language of the treaty and its codification in the regulations of the National Transportation Safety Board. The decision below relies upon the definition of accident codified at 49 C.F.R. § 830.2 which states:

> "Aircraft accident" means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.

[30] *See generally* Annex 13 at 1-5.

[31] International Civil Aviation Organization, *Accident Investigation and Prevention Divisional Meeting, Montreal, 3-24 June 1974, Report* 8-1 (Doc. 9106, AIG) (1974).

uniformity in, among other things, investigation of aircraft accidents. Annex 13 implements this purpose.[30] The International Civil Aviation Organization has specifically warned against misuse of the Annex 13 definition of "accident" outside the context for which it was intended: "The meeting was mindful that the definition, in accordance with the forward to Annex 13, applied only to the use of the term within the Annex."[31] As the dissent below observes, the Annex 13 definition of accident was "designed to facilitate information reporting to the National Transportation Safety Board and has little bearing on the distinction between accidents and occurrences created by the text of the Convention itself." Pet. App. 12a, 724 F.2d at 1388.

In interpreting a treaty, a court must "ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made." *Restatement (Second), Foreign Relations Law of the United States* § 146 (1965). By relying upon a definition of "accident" drawn from unrelated re-

porting requirements, the decision below has failed to give effect to the term "accident" in the context in which it occurs.

II

THE MONTREAL AGREEMENT DOES NOT ALTER THE MEANING OF ARTICLE 17 NOR MAKE AIR CARRIERS INSURERS OF THEIR PASSENGERS' HEALTH

The Warsaw Convention establishes a liability system based upon the fault of the carrier in causing passenger injury, not upon the allocation of risks, as the decision below acknowledges. Pet. App. 5a, 724 F.2d at 1385. Under this system, a presumption of carrier liability for an injury caused by an accident on board an aircraft is created; this presumption can be rebutted by an affirmative showing that the carrier acted with due care. Art. 20(1), Pet. App. 21a.[15] Contrary to the ruling of the court below, the Montreal Agreement's waiver of the due care defense does not expand the class of events for which carriers are potentially subject to liability under article 17.

A. The Montreal Agreement Is A Contractual Waiver of the Due Care Defense

The Montreal Agreement is a private agreement among air carriers that was designed to forestall U.S. denunciation of the Convention by raising the liability ceiling for personal injuries and death resulting from accidents on

[15]This shift in the burden of proof in return for a ceiling on liability was "the essential bargain" of the Convention. Lowenfeld & Mendelsohn, 80 Harv. L. Rev. at 500; *see* 1 Shawcross & Beaumont, *Air Law* ¶ VII(4) (4th ed. 1984).

flights serving the United States.[16] It is not a protocol amending the Convention. Because it is a private agreement and not a treaty, it "did not modify in any way the meaning of Article 17 of the Convention."[17]

The contractual modifications to which the carriers agreed at Montreal are set forth in the tariff provisions of the contracting air carriers.[18] In essence, each carrier has agreed to include in its conditions of carriage on international flights serving the United States: (1) a provision raising the liability ceiling per passenger to $75,000, and (2) a promise in the event of a claim for death or personal injury not to avail itself of the due care defense stated in article 20(1) of the Convention. *See* Pet. App. 24a-25a. Other provisions of the Convention are not disturbed.

B. The Montreal Agreement Does Not Make Carriers Insurers of Their Passengers' Health

The carrier's waiver of the due care defense removed entirely the issue of carrier negligence from personal injury claims subject to the Convention. Hence, the Montreal Agreement has sometimes been said to impose "absolute liability."[19] Yet the agreement "does not change

[16]*See* In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d at 1305.

[17]In re Tel Aviv, 405 F.Supp. at 155 n.2; *see* MacDonald v. Air Canada, 439 F.2d at 1405n.

[18]The precise language of these provisions is stated in CAB Agreement No. 18900. Pet. App. 24a-28a.

[19]The term "absolute liability" is frequently used as an equivalent of "strict liability," meaning liability without fault. *See, e.g.*, Askew v. American Waterways Operators, Inc., 411 U.S. 325, 327, 336 (1973); Laird v. Nelms, 406 U.S. 797, 798 (1972). This is the sense in which the term is used here and by Lowenfeld and Mendelsohn

the substance of the liability—i.e., the character of the compensable injuries—as it is provided in article 17 of the Convention".[17]

Nothing in the agreement or its history evinces an intent to expand the class of potentially compensable injuries or to make carriers insurers against all risks of air travel. The Montreal Agreement *"contains none of the basic elements of an insurance contract.* It is exactly what it purports to be, a *waiver of certain defenses* in return for a limitation of liability in event of an action alleging a breach of duty and damages therefrom." *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E. 2d 367, 372, *cert. denied*, 409 U.S. 878 (1972) (emphasis supplied). In other words, "[t]he duty prescribed by the Convention of carriers to passengers remains unchanged by the Montreal Agreement: to transport as agreed, free of accidents, not of all occurrences." Pet. App. 14a, 724 F.2d at 1389.

Even under a system of strict liability, there must be some measure defining the range of events to which such liability applies.[18] The most widespread application of the concept of strict liability in tort has been in the area of products liability. There it is clear that "the manufacturer is liable only for some of the physical injuries caused by his products." Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 365 (1965).[19] This class of injuries is delineated by asking whether the product which caused the injury was defective.[20] However, "the manufacturer does not thereby become the insurer of the safety of the product's user."[21]

Where strict liability is imposed for injuries caused by defective products, there is required a threshold showing that some defect in the product existed. "[P]roof of injury alone is not sufficient to create liability."[22] Article 17's threshold requirement that an accident be shown functions in a similar manner to define the scope of the carrier's duty to its passengers. To dispense with this requirement altogether, as the decision below has done, converts the Warsaw Convention into a form of travel insurance.

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in the article cited below. Pet. App. 7a, 724 F.2d at 1386. *See* 80 Harv. L. Rev. at 358 & n.197 and authorities cited therein.

[17]Rosman v. Trans World Airlines, 13 Av. Cas. (CCH) 17,231, 17,232 (N.Y. Ct. App. 1974) (footnote omitted).

[18]Even where strict liability applies, the defendant's duty to insure safety extends only to certain consequences." W. Prosser, *Law of Torts*, § 79, at 517 (4th ed. 1971).

[19]"The mere imposition of strict liability . . . does not . . . mean that the maker is liable for any harm to anybody under any circumstances." Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967) (Thornberry, J.), *cert. denied*, 391 U.S. 913 (1968).

[20]*See, e.g.*, Rigby v. Beech Aircraft Co., 548 F.2d 288, 291 (10th Cir. 1977); Bellotte v. Zayre Corp., 531 F.2d 1100, 1103 (1st Cir. 1976); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1271 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Restatement of Torts (Second) § 402A(1) (1965).

[21]Daly v. General Motors Corp., 20 Cal.3d 725, 733 (1978) (Richardson, J.); *see* Rigby v. Beech Aircraft Co., 548 F.2d at 291; Collins v. Ridge Tool Co., 520 F.2d 591, 594 (7th Cir. 1975), *cert. denied*, 424 U.S. 949 (1976); Reyes v. Wyeth Laboratories, 498 F.2d at 1271.

[22]Simien v. S.S. Kresge Co., 566 F.2d 531, 537 (5th Cir. 1978) (Clark, J.).

C. The Application Below of the Montreal Agreement is a Radical Departure from Previous Law and Would Create a Whole New Class of Warsaw Claims

In all prior decisions in which an "accident" has been found for purposes of article 17, "the common thread has been a happening or an event which in each case was beyond the normal and preferred mode of operation for the flight", in most cases, "an 'out-of-the-ordinary', unanticipated incident." *Warshaw*, 442 F. Supp. at 410. Thus, article 17 has been held applicable to passenger injury resulting from skyjacking[9] and terrorist acts.[10] While these opinions do take a broad view of the term "accident", "[i]n none of those cases was the injury suffered during the course of a routine and normal flight." *Abramson v. Japan Airlines*, 739 F.2d 130, 133 (3d Cir. 1984). They do not, as the decision below suggests, make international carriers liable for any and all risks of air travel. Rather, each of these cases acknowledges that "[t]o invoke the Convention, there must be an 'accident' within the contemplation of article 17, and the burden of proof is upon the plaintiff to establish that such an accident occurred." *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. at 706.[11]

Relying on dicta from the terrorist and hijacking cases as authority for policy arguments concerning risk allocation (Pet. App. 7a-9a, 724 F.2d at 1386-87), the decision

[9]Husserl v. Swiss Air Transport Co., 351 F.Supp. at 707.

[10]Day v. Trans World Airlines, 528 F.2d at 33, *see* Evangelinos v. Trans World Airlines, 550 F.2d, 152, 154 (3d Cir. 1977).

[11]Additionally, liability for injuries resulting from terrorism and sabotage were specifically discussed by the Warsaw signatories at Montreal who have expressed their understanding that such injuries are and should be covered. *See* 351 F. Supp. at 707; Lowenfeld & Mendelsohn, 80 Harv. L. Rev. at 503-06. *Husserl* and its progeny primarily rest on this history and not on the vague policy considerations or the overbroad definition of accident on which the decision below relies.

[12]Among the authorities which the decision below cites as construing the Montreal Agreement "as the adoption of absolute liability by the signatories" is Tompkins, *The Warsaw Convention of 1929 and the Proposed Revisions of 1971*, 6 A.B.A. Forum 151 (1971). Pet. App. 7a, 724 F.2d at 1386. A careful reading of the Tompkins article shows, however, that when he referred to a shift from a "system of fault liability" to a "system of absolute liability", he was in fact discussing the Guatemala Protocol's proposed revisions to the Convention. 6 A.B.A. Forum at 157-58. Further, he found the policy justification for adopting absolute liability only for airlines and only as to international transportation to be a "disturbing question." *Id.* at 161.

below concludes that the Montreal Agreement modified the Convention to create a cause of action in tort imposing "absolute liability for injuries proximately caused by the risks inherent in air travel" (Pet. App. 2a, 724 F.2d at 1384). This gives the vague term "absolute liability" a reading which is unfounded in the Montreal Agreement and which ascribes to it legal consequences that a private agreement could not possibly have.[12]

The Ninth Circuit's departure from the requirement of prior decisions that the injury be caused by an unusual or unanticipated event would create a new class of Warsaw Convention claims. This new class of claims, based upon normal and routine aircraft operations, was never intended by the over 120 nations adhering to the Convention or the approximately 200 air carriers subscribing to the Montreal Agreement. Claims could be expected to be asserted for a variety of matters such as asthma attacks, coronaries, fright, mental anguish or emotional distress alleged to have been caused by routine flights. Absent the objective thres-

hold requirement of an accident, evaluating the merits of such claims would be difficult, and baseless litigation would be encouraged.

III

THE THIRD CIRCUIT'S DEFINITION OF "ACCIDENT" GIVES EFFECT TO THE LANGUAGE OF THE CONVENTION AND IS NOT A NEGLIGENCE-BASED STANDARD

The Third Circuit has given effect to the language and intent of article 17. It has maintained the requirement of an accident as an independent prerequisite for liability by defining "accident" as "an unusual or unexpected happening". *DeMarines*, 580 F.2d at 1196. *Accord Abramson v. Japan Airlines*, 739 F.2d at 132. The decision below mistakenly characterizes the Third Circuit's analysis as "a restatement of the due care defense" (Pet. App. 4a, 724 F.2d at 1385), and, relying on its own notions of social policy, effectively abolishes article 17's accident requirement.

DeMarines was also a personal injury action against an airline for a hearing loss allegedly resulting from cabin pressurization changes on an international flight. The court approved as properly stating the law a jury instruction defining an article 17 "accident" as follows:

> An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening. [580 F.2d at 1196.][47]

Recognizing that this definition requires a showing of more than normal pressurization changes, the court said: "Absent testimony indicating that the plane's cabin pressure change was the result of some 'unusual or unexpected happening', we have grave doubts that a finding that an accident occurred in this case is legally supportable." *Id.* at 1197-98.

Very recently, in *Abramson v. Japan Airlines*, the Third Circuit had occasion to reconsider *DeMarines* in light of the Ninth Circuit opinion now before the Court on certiorari. The Third Circuit adhered to its ruling in *DeMarines*, and held that "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury [a hernia] during the course of a routine normal flight should

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[47]The court strongly endorsed this instruction stating: "This definition of accident, which is in accord with our own reading of the relevant case law, properly presented the jury with the correct legal standard for determining the occurrence of an accident." Id. at 1197 (footnote omitted).

[48]*DeMarines* found persuasive the reasoning in *Warshaw*, decided after trial in *DeMarines*, where the court, sitting without a jury, granted judgment for the carrier on substantially identical facts. *See* 580 F.2d at 1197. *Warshaw* held that

> routine repressurization of the cabin of a jet aircraft as it descends from a high altitude to land, when accomplished in the normal and usual fashion without any complications or external disruptions, and in accordance with the customarily anticipated preplanned mode, is not an accident under the provisions of Article 17 of the Warsaw Convention, as modified by the Montreal Agreement. [442 F. Supp. at 407.]

not be considered an 'accident' within the meaning of Article 17." 739 F.2d at 133.[9]

The Ninth Circuit majority mischaracterizes the decisions from the Third Circuit as "applying a restrictive negligence-based definition of 'accident' to injuries involving the effect of depressurization on passenger hearing" and so dismisses them as "out of step" with the Montreal Agreement, in which the carriers waived the due care defense. Pet. App. 10a, 724 F.2d at 1388. The court purports to find support for this conclusion in the cases holding article 17 applicable to injuries resulting from terrorist acts, but ignores that all those cases involved some unusual and unanticipated event as the proximate cause of the injury. It is the lack of such an event, not due care or the

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[9]Other decisions have also followed *DeMarines'* definition of accident. For example, one court has ruled that article 17 does not apply absent a showing of "an unexpected and sudden event that takes place without foresight." Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283, 18,284 & n.6 (D. Md. 1983), *quoting DeMarines*, 433 F. Supp. 1047, 1052 (E.D. Pa. 1977). Another court, citing *DeMarines* and *Warshaw*, concluded that the "flight in question was not 'accomplished in the normal and usual fashion without any complication or external disruption.'" Weintraub v. Capitol International Airways, 16 Av. Cas. (CCH) 18,058, 18,059 (N.Y. App. Div. 1981). *See also* Scherer v. Pan American World Airways, 54 App. Div. 2d 636, 387 N.Y.S.2d 580, 581, 14 Av. Cas. (CCH) 17,410, 17,411 (1976) (absent showing of abnormality in flight, thrombophlebitis attack not an accident for purposes of article 17).

Similarly, a French court has defined an "accident" for purposes of article 17 as "a sudden event independent of the will of the carrier." Judgment of April 28, 1978, Trib. gr. inst., Paris, 33 R.F.D.A. 329, 331 (1978), *reprinted at* 3 *Air Law* 180, *rev'd on other grounds*, Judgment of June 19, 1979, Cour d' appel, Paris, 33 R.F.D.A. 328, *aff'd*, Judgment of Feb. 16, 1982, Cass. civ. 1re, 36 R.F.D.A. 342.

absence of carrier fault, on which the Third Circuit decisions turn. As the dissent below succinctly states:

> The Third Circuit's definition has nothing to do with negligence or the lack of it, so it would not undermine a proper concern for the elimination of the "due care" defenses accomplished by the Montreal Agreement .... If an unusual change in air pressure occurred, it would fit the requirement of an accident under the Convention and [the plaintiff] could recover by operation of the Montreal Agreement whether or not Air France were at fault for, or had taken all due care to prevent, the unusual change. [Pet. App. 12a, 724 F.2d at 1389.]

CONCLUSION

The duty of the courts is "to interpret [a treaty] and administer it according to its terms". *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854). Courts "do not sit to decide whether laws are no longer necessary or to assess the diplomatic consequences of their abandonment". *Reed v. Wiser*, 555 F.2d at 1093. Whether changed circumstances in the industry or changes in social policy concerning risk allocation warrant revisions to the Convention's system of liability are determinations committed by article II, section 2, of the Constitution to the executive and legislative branches which it empowers to make treaties.

Recently, this Court reversed the Second Circuit for substituting its policy judgment for the letter of the agreement adhered to and implemented by the political branches of government. *See Trans World Airlines v. Franklin Mint Corp.*, 80 L.Ed.2d at 287. The decision of the Ninth Circuit

should be reversed because it has substituted its policy judgment to circumvent the fundamental prerequisite of liability imposed by the Convention, an accident.

Respectfully submitted,

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JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AIR FRANCE,
Petitioner,

VS.

VALERIE HERMIEN SAKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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November 15, 1984

Petition for Writ of Certiorari Filed April 30, 1984
Certiorari Granted October 1, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6200

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Superior Court of the State of California
In and for the County of San Francisco

No. 785424

COMPLAINT FOR DAMAGES
(Personal Injury)

Valerie Saks,
Plaintiff,

vs.

Air France, a corporation,
First Doe Company, a corporation,
Second Doe Company, a corporation,
Third Doe through Tenth Does, inclusive,
Defendants.

[Filed Sept. 23, 1981]

CAUSE OF ACTION BROUGHT BY PLAINTIFF VALERIE SAKS AGAINST ALL DEFENDANTS

1. Defendant First Doe Company, a corporation, Second Doe Company, a corporation, and Third through Tenth Does, inclusive are sued herein under fictitious names; plaintiff does not at this time know the true names or capacities of said defendants, but prays that the same may be inserted herein when ascertained.

2. At all times herein mentioned, each defendant was an agent, servant, employee, partner, franchisee and joint venturer of each other defendant, and at all of said times was acting within the course and scope of said agency, service, employment, partnership, franchise and joint venture.

3. At all times herein mentioned, defendants owned, operated, entrusted, maintained, controlled, managed and supervised an Air France 747 aircraft, Flight 003, and more particularly owned, operated, entrusted, maintained, controlled, managed and supervised the cabin area inside the said aircraft.

4. At all times herein mentioned, plaintiff was a fare paying passenger and invitee aboard said aircraft as it was engaged in a non-stop flight from Paris to Los Angeles.

5. On or about the 16th day of November, 1980 when said aircraft was in said flight from Paris to Los Angeles, plaintiff was in the passengers' cabin area.

6. At said time and place, defendants so carelessly and negligent owned, operated, entrusted, maintained, controlled, managed and supervised the said aircraft as to cause the cabin pressure to change drastically thereby causing the plaintiff to receive severe pressure to her left ear.

7. By reason of the premises, plaintiff has been caused to sustain personal injuries and to undergo a course of pain and suffering and has sustained general damages.

8. By reason of her said injuries, plaintiff has been compelled to incur obligations as and for medical services, hospitalization, x-rays, medicines and medical supplies and will in the future be compelled to incur additional obligations therefor; plaintiff does not at this time know the reasonable value thereof, but prays that the same may be inserted herein when ascertained.

9. That by reason of the premises plaintiff has been deprived of her earning power, and will, in the future, be

deprived thereof; that plaintiff does not at this time know the true value thereof, but prays that the same may be inserted herein when ascertained.

WHEREFORE, plaintiff prays for judgment against defendants for general damages, and for the items of special damages above-mentioned when ascertained, and for her costs of suit herein incurred.

Dated: July 27, 1981

ABRAMSON & BIANCO

By: /s/ HAROLD J. TRUETT, III
Harold J. Truett, III

In the United States District Court
For the Northern District of California

No: C-82-0330 RPA

DEFENDANT AIR FRANCE'S ANSWER TO COMPLAINT

[Title omitted in printing]

Defendant Air France answers plaintiff's complaint as follows:

FIRST DEFENSE

Defendant Air France responds to the allegations contained in paragraphs 1 through 9 of plaintiff's complaint as follows:

1. The matters set forth in paragraph 1 of plaintiff's complaint require no response from this defendant.

2. Alleges that it lacks information sufficient to form a belief with respect to the allegations contained in paragraph 2 of the complaint and, on that ground, denies each and every allegation therein.

3. Denies each and every allegation contained in paragraph 3 of plaintiff's complaint, except admits that at the time of this alleged incident Air France had a flight number 003 operating between Paris, France and Los Angeles, California.

4. Denies each and every allegation contained in paragraphs 4 and 5, except admits that plaintiff purchased a ticket for Air France flight 003 from Paris, France to Los Angeles, California on November 16, 1980.

5. Denies each and every allegation of paragraphs 6, 7, 8 and 9 of the complaint.

6. Denies all remaining allegations contained in plaintiff's complaint not expressly admitted herein.

SECOND DEFENSE

7. Plaintiff's complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

8. This court lacks jurisdiction over the subject matter of the allegations of plaintiff's complaint, and maintenance of this action is barred, in that the Court's jurisdiction has been preempted by the Federal Aviation Act.

FOURTH DEFENSE

9. Any damage or injury suffered by plaintiff was the sole result of, or was contributed to by, the negligence of plaintiff.

FIFTH DEFENSE

10. Any damage or injury suffered by plaintiff is the result of her knowing assumption of all risks, if any, involved in travel by this mode of transportation.

SIXTH DEFENSE

11. Plaintiff's right of recovery, if any, is governed by the provisions of the Warsaw Convention, and defendant has met all its burdens under the Warsaw Convention.

SEVENTH DEFENSE

12. Plaintiff's damages, if any, are subject to the damages limitations of the Warsaw Convention.

EIGHTH DEFENSE

13. Plaintiff failed to give defendant timely notice of any alleged injury or damage within the time period required by the Warsaw Convention or otherwise.

NINTH DEFENSE

14. Defendant has denied all of the material allegations of plaintiff's complaint except those expressly admitted herein, and denies that it is liable to plaintiff for the damages alleged in her complaint, or for any damages whatever. If, however, the allegations contained in plaintiff's complaint are found to be true, and Air France is found to be liable to plaintiff for any amount, defendant Air France is informed and believes, and based thereon alleges, that one or more entities or persons are in some manner responsible for the injuries and damages alleged in plaintiff's complaint, and that by reason thereof defendant Air France is entitled to an apportionment among said entities and persons according to law.

WHEREFORE, defendant Air France prays as follows:

1. That plaintiff take nothing from it by her complaint;

2. That plaintiff's action be dismissed with prejudice;

3. That Air France recover its costs of suit and reasonable attorneys' fees; and

4. For such other and further relief as this court deems proper.

Dated: January 18, 1982.

LILLICK McHOSE & CHARLES

By /s/ STEPHEN C. JOHNSON
Stephen C. Johnson
Attorneys for Defendant
Air France

[Certificate of Service omitted in printing]

In the United States District Court
for the Northern District of California
[Title omitted in printing]
No. C 82-0330 EFL
[DEFENDANT AIR FRANCE'S]
NOTICE OF MOTION FOR SUMMARY JUDGMENT
Date: November 19, 1982
Time: 10:00 a.m.

To Plaintiff and Her Attorney of Record:

PLEASE TAKE NOTICE, that defendant Air France will move on November 19, 1982, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Eugene F. Lynch, for an order granting defendant summary judgment and dismissing plaintiff's Complaint herein with prejudice.

PLEASE TAKE FURTHER NOTICE, that if said motion is not granted, defendant Air France will move in the alternative for an order granting partial summary judgment.

These motions will be based upon the attached Memorandum of Points and Authorities and accompanying exhibits, an affidavit to be submitted to the Court at least one week prior to the noticed hearing date, the pleadings on file herein, and upon such other and further evidence as may be presented at the hearing.

DATED: November 4, 1982.

LILLICK McHOSE & CHARLES

By /s/ WILLIAM L. ROBINSON
William L. Robinson
Attorneys for Defendant
Air France

United States District Court
for the Northern District of California
No. C 82-0330 EFL
[DEFENDANT AIR FRANCE'S]
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT
DATE: November 19, 1982
TIME: 10:00 a.m.
[Title omitted in printing]

INTRODUCTION

This action arises out of plaintiff's flight aboard an Air France aircraft between Paris, France and Los Angeles, California on November 16, 1980. Plaintiff, Valerie Saks, alleges that as a result of the operation of the aircraft's pressurization system aboard this flight, she suffered a permanent, severe loss of hearing in her left ear.

Under the Warsaw Convention, which is applicable to this action, defendant Air France may not be held liable for plaintiff's injury unless plaintiff sustains the burden of proving that her injury resulted from an abnormal, unusual or unexpected occurrence aboard the aircraft. This she cannot do. As shown by the post-flight reports and an affidavit from the aircraft commander, there was no unusual happening involving the aircraft's pressurization system. Plaintiff is unable to present credible evidence to the contrary and defendant must, therefore, be granted summary judgment, and plaintiff's complaint dismissed.

If the Court should decide that, in spite of the evidence presented herein by Air France, a factual dispute remains

concerning the functioning of the aircraft's pressure system, Air France requests a partial summary judgment, ruling that plaintiff may not recover unless she sustains the burden of proving by a preponderance of the evidence that her hearing loss was caused by an abnormal, unexpected, or unanticipated condition in the aircraft's pressurization system.

FACTUAL BACKGROUND

Plaintiff boarded defendant's aircraft, a Boeing 747, in Paris on November 16, 1980. She was returning to her home in the Bay Area after an extended visit to England. The flight was scheduled to arrive in Los Angeles, where Ms. Saks intended to meet her parents and, after several days, drive with them to the Bay Area.

After take-off, the aircraft climbed to a cruising altitude of 39,000 feet, where it remained until its descent for landing at Los Angeles some few hours later.[1]

As with all commercial aircraft, the subject aircraft is equipped with a pressurization system for the purpose of maintaining a comfortable air pressure for the passengers within the cabin while the aircraft cruises in the rarified air at high altitudes. The pressurization system is designed to maintain a much higher air pressure within the cabin than exists outside the aircraft. This has the effect of causing the passengers to experience, physiologically, a much lower altitude than that at which the aircraft is flying. On the subject flight, the maximum apparent altitude within the cabin was 6,350 feet.

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[1]The information concerning the flight profile of the aircraft, as well as the operation of the aircraft's pressurization system, as disclosed in the Declaration of William L. Robinson, attached hereto as Exhibit "A", is based upon information provided by Air France.

Upon descent, the aircraft pressurization system is designed so that the rate of change in apparent altitude experienced by the passengers is much lower than the actual rate of change in altitude of the aircraft. The maximum rate of change in the cabin altitude of Ms. Saks' flight, as the aircraft descended to Los Angeles, was 370 feet per minute.

Throughout the subject flight, the aircraft pressurization system operated in the normal ("AUTO") mode. It performed as designed in all respects. There were no malfunctions or mechanical problems of any sort. As disclosed in answer to Interrogatories propounded by plaintiff, an aircraft Material Discrepancy Report is filled out by the aircraft commander at the conclusion of each flight. The purpose of this report is to note mechanical deficiencies encountered during the flight. Attached hereto as Exhibit B, and previously produced to plaintiff, is a copy of the Material Discrepancy Report for the subject flight. As shown by the accompanying translation of the report, there is no mention of any problems with the pressurization system. Additionally, an affidavit has been executed by the aircraft commander stating that no pressurization problems were encountered during the flight.[2]

It is Ms. Saks' testimony, as disclosed during her deposition (Exhibit C, attached hereto), that as the aircraft began its descent to Los Angeles, she experienced severe

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[2]This affidavit is en route from France and, with the Court's permission, will be submitted as an exhibit prior to the hearing of this Motion. See the accompanying Declaration of William L. Robinson. ADDENDUM: said affidavit is now attached hereto as EXHIBIT D.

pressure within her ears and head. (Saks Deposition, p. 82.) She did not bring her condition to the attention of any member of the Air France crew, although she believes her discomfort to have persisted for the better part of an hour. (Saks Deposition, p. 82.)

After leaving the Los Angeles airport, Ms. Saks went to a hotel to await the arrival of her parents, who were to meet her the following day. The next morning, while using the telephone, Ms. Saks because aware of a serious hearing loss in her left ear. (Saks Deposition, p. 94.) She consulted with a physician several days later, after her return to her home in the Bay Area. (*Id.*) A severe hearing loss in her left ear was diagnosed. This hearing loss allegedly continues and Ms. Saks has been informed by medical specialists that her condition is likely to be permanent.

ARGUMENT

This action is controlled by the provisions of the Warsaw Convention,[1] inasmuch as plaintiff was engaged in air travel from France to the United States at the alleged time of her injury. Article 1(1) of the Convention states that it is applicable to "all international transportation of persons . . . performed by aircraft for hire." Article 1(2) defines "international transportation" as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated . . . within the territories of two High Contracting Parties . . . .

[1]Officially entitled "Convention for the Unification of Rules Relating to International Transportation by Air". The complete text of the Convention may be found following 49 U.S.C.A. § 1502.

The Warsaw Convention, as an international treaty to which the United States subscribes, is the supreme law of the land and preempts local law in cases where it is applicable. *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 407 (E.D. Pa. 1977). Furthermore, where the Warsaw Convention applies, it exclusively governs the rights and liabilities of the parties. *Butz v. British Airways*, 421 F. Supp. 127, 129 (E.D. Pa. 1976), *aff'd*, 566 F.2d 1168 (3d Cir. 1977).

An air carrier's liability for passenger injury while engaged in international air travel is set forth in Article 17 of the Convention:

> The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The plain language of Article 17 requires that any injury suffered by a passenger be the result of an "accident" occurring in connection with the flight. In *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971), it was held that the finding of an accident is "the first requirement for invocation of the Warsaw Convention." *Id.* at 1404. Furthermore, it is the plaintiff's burden to prove the occurrence of an accident. (*Id.* at 1405.)

Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400 (E.D. Pa. 1977), is a case which is directly on point. It holds that a passenger cannot recover under the Warsaw Convention for a loss of hearing occurring as a result of

the normal, purposeful operation of an aircraft's cabin pressurization system. There is no case law to the contrary.

In *Warshaw*, as here, plaintiff claimed a severe, permanent loss of hearing in his left ear. As here, plaintiff claimed that his hearing loss was a result of the operation of the cabin pressurization system, which caused there to be an increase in the cabin air pressure as the aircraft descended from its cruising altitude for landing. However, just as is the present case, the aircraft pressurization system operated normally and suffered no malfunction during the flight. (442 F. Supp. at 403.)

Based on the medical evidence presented, the *Warshaw* court concluded that the normal cabin repressurization of the subject aircraft was the cause of plaintiff's hearing loss. (*Id.* at 405.) Nevertheless, after an extensive examination of the Warsaw Convention and the case law interpreting its requirement for an "accident" upon which to found liability, the court held that plaintiff's injury, "proximately caused during normal operation of a properly functioning aircraft", was not an "accident" for which a carrier would be liable under Article 17 of the Warsaw Convention. (*Id.* at 413.)

In its survey of the case law addressing the question of what constitutes an accident under the Warsaw Convention, the court found as a common thread for liability "a happening or an event which . . . was beyond the normal and preferred mode of operation of the flight". (442 F. Supp. at 410.) Clearly, based upon the evidence submitted herewith, no abnormal "happening" occurred on the subject flight. Absent such a "happening," *Warshaw* requires the dismissal of plaintiff's claim.

Further support for defendant's position is found in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978). There, plaintiff alleged a permanent loss of equilibrium occurring as a result of pressure changes within an aircraft on a flight covered by the Warsaw Convention. At trial, plaintiff prevailed. Defendant appealed on various grounds, including that the trial court should have granted a judgment n.o.v. or a new trial due to insufficient evidence from which the jury could have inferred the occurrence of a Warsaw "accident."

Noting that the plaintiff had presented little or no evidence from which it could be concluded that the aircraft pressurization system had operated in an unusual or unexpected fashion, the court expressed "grave doubts that a finding that an accident occurred in this case is legally supportable." (580 F.2d at 1198.) The court found it unnecessary to act directly on its doubts, since it relied upon other grounds to remand the case for a new trial. *(Id.)*

What is especially relevant about the *DeMarines* opinion for present purposes is the review of the trial court's instruction to the jury on the question of what constitutes an accident under the Warsaw Convention. According to the charge to the jury:

> An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an aircraft is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening. (580 F.2d at 1196.)

After reciting this instruction, the Third Circuit stated that "this definition of accident, which is in accord with our own

reading of the relevant case law, properly presented the jury with the correct legal standard for determining the occurrence of an accident." *(Id.* at 1197.)

Warshaw and *DeMarines* are the only two cases which address the issue of whether normal aircraft pressure changes can provide the basis for a finding of liability under the Warsaw Convention. Both cases hold that no liability can be found in a case where the aircraft pressure system works as designed and intended. That is precisely the situation here. As there is no genuine issue of fact regarding the normal operation of the aircraft pressurization system, defendant is therefore entitled to an order dismissing plaintiff's complaint with prejudice.

CONCLUSION

Based upon the evidence presented herewith, and the applicable case law, defendant's motion for summary judgment should be granted and an order issued dismissing plaintiff's complaint with prejudice. Alternatively, should the court decide that there remains any factual dispute concerning the operation of the aircraft's pressurization system sufficient to justify a trial, defendant requests a ruling that plaintiff may not prevail unless she proves by a preponderance of the evidence that there was a malfunction of the aircraft's pressurization system.

DATED: November 5, 1982

LILLICK MCHOSE & CHARLES

By: /s/ WILLIAM L. ROBINSON
William L. Robinson
Attorneys for Defendant
Air France

In The United States District Court
For The Northern District of California

No. C 82-0330 EFL

DECLARATION OF WILLIAM L. ROBINSON

DATE: November 19, 1982

TIME: 10:00 a.m.

[Title omitted in printing]

I, WILLIAM L. ROBINSON, declare as follows:

1. I am an attorney in good standing, licensed and admitted to practice before this Court and in the State of California. My business address is Two Embarcadero Center, Suite 2600, San Francisco, California 94111.

2. I am an associate with the law firm of Lillick McHose & Charles, attorneys for defendant Air France in the captioned case. If called as a witness in this matter, I could and would testify as follows:

3. Plaintiff, Valerie Saks, alleges in her Complaint in this action that she suffered an injury to her left ear as a result of changes in the cabin pressure of defendant's Flight 003 from Paris to Los Angeles on November 16, 1980. (See paragraph 6 of plaintiff's Complaint on file herein.) This injury is alleged to have resulted in a severe, permanent hearing loss.

4. In answer to defendant's Second Set of Interrogatories, filed on October 22, 1982, plaintiff states she intends to call certain physicians at trial who will testify that in their opinion the "sole cause" of plaintiff's hearing loss

was "cabin repressurization." (See plaintiff's response to Interrogatory No. 9, Second Set, on file herein.)

5. In response to my inquiries regarding the flight profile and cabin pressurization schedule for the subject flight, I have been informed by Air France personnel in Paris that the flight maintained a cruising altitude of 39,000 feet; that the cabin pressurization system was operated in its normal, or "AUTO" mode; that while at its cruising altitude the cabin pressure of the aircraft was equivalent to an altitude of 6,350 feet; and that during its descent into Los Angeles, the maximum rate of change of cabin altitude which would have been experienced by the passengers was 370 feet per minute.

6. I have also been informed, in response to inquiries prompted by plaintiff's Interrogatories, that a "material discrepancy" or "Compte-Rendu Materiel" is prepared by the aircraft commander at the conclusion of each flight for the purpose of noting equipment malfunctions or discrepancies that occur. Attached as Exhibit B to this Motion is a copy of the material discrepancy report filled out by the aircraft commander on the subject flight. Also attached as part of Exhibit B is an English translation of the report, which was originally completed in French. The English translation was supplied, at my request, by Inlingua, a commercial translation service. No evidence of any pressurization system malfunction appears from the report.

7. I requested that the aircraft commander for the subject flight, M. Robert Marcelin, execute an affidavit confirming that no cabin pressurization system problems were encountered and that the system worked normally. I was

informed on November 1, 1982 that such an affidavit had been executed in France and is being forwarded to me. I expect to have the affidavit and to be able to present it to the Court and to plaintiff's counsel no later than November 12, 1982.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 4th day of November, 1982, at San Francisco, California.

William L. Robinson

BEST AVAILABLE COPY

Exhibit B

..AVICE **COMPTE-RENDU MATERIEL**

CDG. LAX

F CBC | DATE 16/11/80 | N° 01070

B | LIGNES: AF003

FPGKLAX | MASSE | VIDANGE CHARGE GTR | ARRIVEE DEPART A | V C

RETARDS ▶ CDG. 00h05 embarquement.

VISITE PRE-VOL B743 : VT LAX effectuée NOV 16/80 NRGTR

TRAVAUX RON | TRAVAUX SOLDES

ETAPE ou ESCALE	ATA	OBSERVATIONS DE L'EQUIPAGE	TRAVAUX EFFECTUES OU PROPOSITIONS EVENTUELLES DE TOLERANCES TECHNIQUES	TRAVAUX RON Nom/Signat.	TRAVAUX SOLDES Nom/Signat.
LFPG KLAX	31	AIDS : "TAPE LOW" allumé à 16h43	LAX Remplacé Tape s/n 292 par s/n 797	LAX K.F NOV 16/80 NRGTR	
LFPG KLAX	34	Pupitre Annexe Arrière : Poignée de Gouvernail de Direction en G. Poignée de Braquage de Dérive en D ; apparait sur bizarre. "ALTM LOW R2" sur P7	LAX : Poignée REMIS en position normale. Test positif sous P/B INOP. CDB informé de la mise hors service du G/B selon MEL 31-01 sur P7.	LAX K.F NOV 16/80 NRGTR	
LFPG KLAX	77	EGT suite CRM précédente GTR 2 : ΔEGT = 11° GTR 3 : ΔEGT = 18° (probablement)	~~EGT non conforme~~ OK Moteur testé au sol.		
LFPG KLAX	21	3 "PACKS" en A/C croisière T° "ACM OUTLET" admissions T° "COMP DISCH" Ref 2" = 80° 3 = 120° PACKS Ref 2 : by pass valve HEAT outlet door 3/4 HEAT mix door = HEAT PACK 3 : by pass valve 1/2 mix door 1/8 COOL mix door 3/4 HEAT Idem PACK 3 : Même anomalie PACK 3 donne l'impression de fonctionner correctement	LAX Test PACK 1-2-3 : position et indic. idem sur P/B et P8 1/3 sur P/B 15/170 2/3 sur P/B 15/170	LAX K.F NOV 16/80 NRGTR	

TOLERANCES TECHNIQUES AU DEPART

ERE VISITE	REVALIDATION	NOM et SIGNATURE
	DATE Prévol 16 11 80	

93 SERVICE DAVER NOM et SIGNATURE LICHON

DG DATE 15 11 80

OBS COMMANDANT :

MARCELIN | DEL. PROVL BESSET/RICOTIER

MECANICIEN : BRAND/LABAT

DD JEV. 78 - 2009 - 0

BEST AVAILABLE COPY

AIR FRANCE EQUIPMENT STATUS REPORT

FLIGHT CDG-LAX

DATE D 16 M 11 Y 80 N° 81070

A/C REG. AF 003

DOOR A/C

LIGHT DURATION 1 2 3 4

VIGILANCE CHANG. G T R V A C

Replaced I AVC

CAPTAIN

MECH.ENG.OFF.

TECHNICAL TOLERANCES UPON DEPARTURE

LAST VISIT REVALIDATION DATE SIGNATURE

Type SERVICE SIGNATURE

Location DATE

CAPTAIN'S OBSERVATIONS :

VISAS CAPTAIN MECH.ENG.OFF.

DELAYS 5 min. at CDG's embarking

PREFLIGHT VISIT
VT LAX performed Nov.16.80

STOP or PofCALL	ATA	CREWS COMMENTS	WORKS PERFORMED OR POSSIBLE TECHNICAL TOLERANCES PROPOSED	UNPAID WORKS	PAID WORKS
LFPG	31	AIDS "PAGE LOW" lighted at 16:15 Hrs.	LAX : replaced tape S/N 292 Jac S/N 797		
KLAX					
LFPG	34	Radio Soundings on Stop. Flag at G.	LAX : Stop switch does not stop indicator		
KLAX		No Flag at D ; appears when drawing breaker "ALTM LOW " R 2" on P7	remains functioning of the (2 illeg.words) test possible. To perform E.S INDIC. LDG.		
			Possibility to cut off by C/B mentioned on P7		
LFPG	77	EGT - Cont'd previous ES Reports			
		GTR 2 : EGT - 11°			
		GTR 3 EGT - 18° (no change)	Seen		
LFPG KLAX	21	3 Packs on ½ opening to "ACM OUTLET" identical to "COMP DISCH" 1 and 2 = 80° 3 = 120°			
		PACK 1 & 2 By-pass valve HEAT Inlet Door 3/4 HEAT Exit Door HEAT	LAX - Cal PACK 1-2-3 Position and indicators ditto on F/O and 1/2 #3 on 1/2 15/170 #3 on F/6 15/190 /could be 170 or 120		
		PACK 3 - By-pass valve 1/2 Inlet Door 1/8 COOL Exit Door 3/4 HEAT	See following ESreport		
		ditto PACK 3 Full opening			
		PACK 3 Closed while in flight on AUTO - Prepositioning is correct.			

Exhibit C

In the United States District Court
Northern District of California

No. C 82-0330 RPA

DEPOSITION OF: VALERIE SAKS

April 1, 1982

Q. Okay, and when was it that you first felt that you had some problem on this particular flight?

A. I don't understand what you mean. You mean on the flight itself?

Q. Yes.

A. As we were starting to come in to land.

Q. And what were the sensations at the time that you remember having a problem? In other words, how did you know it was coming in to land?

A. Well, it was about that time. We had been up in the air for a great length of time. They were starting the descent. I believe they usually announce they are starting their descent, it will be so much longer in the air. And that's when I felt it.

Q. Okay. How much after the descent began did your physical problems begin?

A. Very shortly.

Q. Okay. Within a matter of second or minutes or what?

A. Five, ten minutes.

Q. Okay. And what was your first sensation of discomfort?

A. Extreme pain in my ears, pressure in my head, pressure in my ears.

Q. Sudden and extreme?

A. Yes. It was very sudden, and I felt pressure in my head and in my ears.

Q. Did you bring that to the attention of any of the flight crew personnel?

A. Not at that time, no, I did not.

Q. Okay. Did you hear anything at the time?

Mr. Cohen: Hear anything?

A. I don't understand what you mean.

Mr. Robinson: Q. For example, a bang or loud noise or anything like that.

A. No, I didn't.

Q. Nothing out of the ordinary that you heard?

A. That's right.

Q. Anything out of the ordinary that you saw?

A. No.

Q. Okay. So, it was a completely normal flight in all regards, as far as you're aware, except that you felt sudden pressure inside your head?

A. That's right.

Q. Okay. And did you then take some steps to relieve that pressure?

A. I tried everything that I could do to relieve it, yes.

Q. Which was what?

A. Blowing my nose, chewing gum, yawning, plugging my nose and blowing.

Q. Did that seem to help at all?

A. Didn't help in the least.

Q. On either ear?

A. On either ear.

(BRIEF RECESS) [82-83]

A. No.

Q. You didn't seek medical care until some five days later when you returned here with your parents; is that right?

A. That's right.

Q. Did you do anything to relieve your physical discomfort? By that I mean take medication—

A. I didn't take medication. I did—I took aspirin for the headaches that I was getting, but I didn't take any medication without knowing what I was taking.

Q. Let's see, then. It was the next day when you discovered your hearing loss; you couldn't hear the dial tone on the telephone?

A. That's right.

Q. And that occurred at the hotel?

A. Yes.

Q. But you still didn't seek medical attention?

A. I still didn't really realize there was anything that wrong. I still thought it would clear. I had no idea.

Q. You realized you didn't have any hearing in your left ear but thought it would improve or get better or—

A. That's right.

Q. And then when you returned and saw—was it Dr. Arnold, the first doctor you saw?

A. Yes.

Q. And that was on November the 21st or thereabouts?

A. The 21st it was.

Q. And he diagnosed your problem as a permanent hearing loss or complete hearing loss in the left ear—

A. No. He said it was a total hearing loss in my left ear.

Q. And just to be sure that "total" means the same thing to me that it does to Dr. Arnold, that means you can't hear anything?

A. Correct.

Q. No frequency, no volume, nothing?

A. That's right.

Q. Okay. And so far as you know, that condition has not changed?

A. That's correct.

Q. Still total hearing loss in your left ear?

A. That's right.

Q. Okay. Has Dr. Arnold or any other doctor that you've consulted recommended any particular treatment for you?

A. Dr. Arnold prescribed, when I first went to him, pills, antibiotics, I believe; and then at a later date a pain pill.

Q. Why did he recommend antibiotics; do you know?

A. I honestly don't know.

Q. Okay. Any recommendation for surgery?

A. Yes. Dr. Althaus did suggest surgery.

Q. What kind of surgery did he suggest?

A. Something where you go in and see if there's water on the eardrum.

Q. Did you have that done? [94-95]

Exhibit D

In the United States District Court
for the Northern District of California

No: C-82-0330 EFL

[Title omitted in printing]

AFFIDAVIT OF ROBERT MARCELIN

I, ROBERT MARCELIN, being first duly sworn, depose and say:

1. I am employed as a commercial pilot by Air France. I am fully qualified as a Captain (aircraft commander) of Boeing 747 aircraft.

2. On November 16, 1980, I was acting as the captain of Air France Flight 003, a Boeing 747, from Paris, France to Los Angeles, California. It is my understanding that plaintiff, Valerie Saks, was a passenger on this flight.

3. During the entire course of the subject flight, the aircraft's cabin pressurization system worked completely normally in all respects. I have reviewed the material discrepancy report which I filled out immediately after the flight, a copy of which is attached hereto as EXHIBIT A, and the absence of any reference to the pressurization system confirms that the system worked properly. It is the company policy of Air France, which I follow, to note on the post-flight material discrepancy reports the abnormal operation of any aircraft component, system or device.

4. I received no notification from any of the passengers during the flight that they were experiencing any physical discomfort in their head, sinuses, or ears. If anyone encountered such problems and had notified the aircrew, I would have taken all steps possible to help the passenger. Such steps might have included rendering medical assistance, altering the flight profile of the aircraft, or adjusting the cabin pressurization system, depending upon the circumstances and the nature of the passenger's discomfort.

The foregoing is true and correct and, except where indicated, is within my personal knowledge. If called as a witness herein, I could and would competently testify to the matters set forth above.

DATED:

/s/ Robert Marcelin
Robert Marcelin

Subscribed and Sworn to
before me this 26th day
of October, 1982.

BEST AVAILABLE COPY

Utiliser un crayon bille et appliquer une pression constante assez forte de manière à obtenir une reproduction parfaite par tous les feuillets.

COMPTE-RENDU MATERIEL — RETARDS ▶ CDG. 00h05 embarquement.

VISITE PRE-VOL B747 : VT LAX effectuée NOV 16/80 REPTE

LAX — M 11 — A 80 — N° 81070

LIGNES : AF003

VIDANGE CHARG G T A V — ARRET ENVOL A C

ETAPE ou ESCALE	ATA	OBSERVATIONS DE L'EQUIPAGE	TRAVAUX EFFECTUES OU PROPOSITIONS EVENTUELLES DE TOLERANCES TECHNIQUES	TRAVAUX NON SOLDES LIEU/DATE Nom/Signat	TRAVAUX SOLDES LIEU/DATE Nom/Signat
LFPG KLAX	31	AIDS : "TAPE LOW" allumée à 16h15	LAX Remplacé Tole s/N 292 par s/N 797	LAX K. AF NOV 16/80 REPTE	
LFPG KLAX	34	Indic Annex ant arrêt : chargeurs à G. Pas de chargeur à D ; apparait pas tenant le freinage. "ALTM LOW R2" sur P7	LAX : Dans les MAINT ne remplace pas indicateurs ARTO en fonction des pleins faits. Tout possible pour BTS : NOVC, CDG Tout à faire depuis par C/B cote au P7	LAX K. AF NOV 16/80 REPTE	
LFPG KLAX	77	EGT suite CRM précédente			
		GTR 2 : Δ EGT = 11°			
		GTR 3 Δ EGT = 18° (peak indicator)	EGT à confirmer dans Vu spectromètre work.	CDG Alerte Vibrat fond	
LFPG KLAX	21	3 "PACKS" en 1/2 ouverture T° "ACM OUTLET" admettaient T° "COMP DISCH" Ack 2 = 80° 3 = 120°	LAX Def. pack 1-2-3 position et vit. idem sur F/O et F/E N°3 sur F/O 15/17c N°3 sur F/E 15/17c	LAX K. AF NOV 16/80 REPTE 15/150	
		PACKS Ack 2 by pass valve HEAT inlet door 3/4 HEAT outlet door HEAT			
		PACK 3 by pass valve 1/2 inlet door 1/8 COOL outlet door 3/4 HEAT idem PACK 3 alarme ouverture PACK 3 fermé (sur sol pour AUTO Automatiquement remet	Work non terminé.		

CHNIQUES AU DEPART

STATION	NOM et SIGNATURE
Pearl & Jfk Mtl/LA	
LAX 1180	LICHOY

OFF. PILOTE : BESSET/RICOTEAU

9T

OFF. Mécanicien

In the United States District Court
For the Northern District of California

NO. C 82-0330 EFL

[Title omitted in printing]

Date: November 19, 1982
Time: 10:00 A.M.

[PLAINTIFF'S]
MEMORANDUM OF POINTS AND AUTHORITIES
RE SUMMARY JUDGMENT

1. INTRODUCTION

This is an action for damages alleging personal injuries sustained onboard Air France Flight 003 between Paris, France and Los Angeles, California on November 16, 1980. Plaintiff, Valerie Saks, a US citizen currently residing in Great Britain, alleges she sustained a total loss of hearing in her left ear as a result of cabin pressurization changes as the aircraft descended for landing. Discovery to date has not disclosed any malfunction or misoperation of any aircraft system or component, most particularly including the cabin pressurization system. However, owing to the distance and expense involved, none of the cockpit or cabin crew have been deposed. Other passengers on the airplane have been interviewed by the parties; two have been deposed. None recall any event suggestive of pressurization malfunction.

It is not disputed that the injury which plaintiff sustained occurred onboard the aircraft at a time it was descending for landing and, concurrently, pressurizing. As experienced by the plaintiff, the sensation was very sudden, extreme and without warning. (Saks deposition, Page 82).

The sole question of law presented to this court by the parties is whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an "accident" within the meaning of Article 17 of the Warsaw Convention, as modified by the Montreal Agreement.

2. JURISDICTION AND VENUE

This lawsuit was originally filed in Superior Court, State of California but was removed pursuant to 28 USC 1441(d). Air France is an "agency or instrumentality of a foreign state" as defined by 28 USC 1063(b). Consequently, plaintiff does not have the right to a trial by jury. The parties stipulated to venue within the Northern District.

3. APPLICABLE LAW

The Warsaw Convention (Convention), 49 Stat. 3000 (49 USCA, 1502 at P. 430 et seq. (West 1976), as modified by the Montreal Agreement, 31 Fed.Reg. 7302 (1966), applies to this case. Liability of the carrier is set forth in Article 17 of the Convention as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident* which caused the death so sustained took place onboard the aircraft or in the course of any of the operations of embarking or disembarking. (Emphasis added.)

The Convention includes a defense for the carrier's exercise of due care (Article 20(1)), for contributory negligence (Article 21) and a severe limitation of liability of 125,000 francs, then valued at $8,300 (Article 22(1)).

Major dissatisfaction with the Convention, particularly with the liability limitation, led the United States to denounce it in November, 1965. An international conference was convened in Montreal in 1966 to resolve the substantial difficulties which would occur should the major commercial aviation power withdraw from the "Warsaw System". An interim agreement was reached May 16, 1966 whereby international air carriers changed their tariffs as permitted by Article 22(1) of the Convention, bypassing the treaty amendment procedures which required ratification by the parties. Denunciation of the treaty was then withdrawn and today international flights operating to and from the United States, such as Air France 003, remain subject to the Warsaw Convention as amended by the Montreal Agreement.

The effect of the new arrangement was to create a special legal system for injuries on aircraft on international flights. Limited to $75,000, ". . . (l)iability, however, was no longer based on fault. A special *absolute liability standard* was created for injuries which were proximately caused by some 'accident' which occurred onboard the plane, or in the process of imbarcation or debarcation." *Warshaw v. Trans-World Airlines, Inc.* 442 F.Supp. 400 (DC Pa-1977), 14 Avi 18297, 18303.

4. DEFINITION OF "ACCIDENT"

It has been said that "the finding of an 'accident' is the first requirement for the invocation of the Warsaw system", *McDonald v. Air Canada* (1971), CA-1 Mass.) 439 Fed.2d 1402, 11 CCH Avi 18029. See generally Speiser & Krause, *Aviation Tort Law*, Section 11 et seq. (Bancroft-Whitney, 1978). The Convention is silent regarding definition of the word "accident". In *Maugnie v. Compagnie Nationale Air France* (1977, CA 9 Calif.) 549 Fed.2d 2156, 14

CCH Avi 17534, cert den (1977) 431 US 974, 97 SCt 2939, the Ninth Circcit stated that the courts take a broad view of the term, noting that "today the Convention functions to protect passengers from the *hazards of air travel* and also spreads the accident cost of air transportation among all passengers. (Citation omitted). Taking a broad view of the term 'accident' courts generally have extended air carrier liability to include injuries resulting from such *modern air hazards* as hijacking and terrorist attack." *Maughnie v., supra*, 14 CCH Avi at 17536. Utilizing an expansive view of the term, the courts have constantly held such intentional acts as sabotage and hijacking to be "accidents" within the meaning of the Convention, *Husserl v. Swiss Air* (SDNY, 1975) 388 F.Supp. 1238, 13 CCH Avi 17603; *Day v. Trans-World Airlines, Inc.* (CA2, 1975) 528 F.2d 31, 13 CCH Avi 18144, cert den (1976) 429 890, 97 SCt. 246; *Karfunkel v. Air France* 427 F.Supp. 971 (1977) (hijacking is "accident" where Montreal Agreement not effective, here Entebe hijack and raid); *Krystal v. British Airways* (CD Cal. 1975) 403 F.Supp. 1322; *Air France v. Giliberto* 23 Ill. 106, 383 NE 2d 977, 15 CCH Avi 17429 (Ill. Sup.Ct. 1978), cert den 441 US 932, 99 SCt. 2052 (1979), as have incidents induced by carrier negligence, third party negligence and acts of God such as unanticipated turbulence; *Demanes v. Flying Tiger Line, Inc.* (ND Calif, 1967) 10 CCH Avi 17611 (plane crash is "accident"); *Berguido v. Eastern Airlines* (CA 3, 1966) 369 F.2d 874, 9 CCH Avi 18319; *Block v. Air France* (CA 5, 1967) 386 Fed.2d 323, 10 CCH Avi 17518. Turbulence is an "accident", *Heflet v. Pan American World Airways, Inc.* (NY Sct. 1972) 12 CCH Avi 17247. Trip and falls onboard the aircraft are "accidents", *Chutter v. KLM Royal Dutch*

Airlines (SDNY 1955) 132 F.Supp. 611, 4 CCH Avi 17733; *MacDonald v. Air Canada, supra.*

Exactly what type of an event constitutes an "accident" has been specifically discussed in only two contexts. The first involved hijacking and other terrorist or sabotage activities of third persons. Consistently, such intentional acts have been deemed "accidents" within the meaning of the Convention. In *Husserl* I, *supra*, the court responded to the air carrier's argument that intentional damage was not an accident, as follows:

> Although hijacking was probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated, the Montreal Agreement seems to resolve whatever doubt might have existed over the construction of the word "accident". It is significant that press releases of the State Department and the order of the Civil Aeronautics board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of *'absolute liability'* upon the carrier. CAB Order Number E-23680, 31 Fed. Reg. 7302 (1966); Department of State Press Release Nos. 110, 111; 54 Dept. opf State Bull. 955, 956 (1966) ("Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.").

Since the first *Husserl* case, the courts have uniformly held intentional terrorism, sabotage or hijacking to be an "accident" within the Convention unless the scene of the injury is so far physically separated from the operation of

the aircraft as to be ". . . located in a 'safe place', removed from the risks now inherent in air transportation". *Evangelinos v. TWA* (CA3d 1977) 550 F2d 152, 14 CCH Avi 17612, at 17614. In this context it has generally been the airline which sought that an "accident" be found and the injured passenger who argued the event was not within the Warsaw "definition"; the former to seek the monetary protection of Warsaw, the latter to argue ordinary negligence and obtain unlimited damages.

The second line of cases defining "accident" are those very few cited by Air France which specifically discuss pressurization induced ear and equilibrium injuries. These decisions are in error because they ignore the purpose and intent of the Convention, misinterpret the actions and policy of the Government and misapply common law, sense and language.

a. *"Accident" Means "Hazard of Air Travel"*

A fair reading of the Convention, of the Montreal Agreement, and of the applicable case law compels the conclusion that "accident" is meant to be used synonymously with "hazards of air travel". "The Warsaw drafters wished to create a system of liability rules that would cover *all the hazards of air travel.* (Citations omitted) (Emphasis added)." *Day v. Trans-World Airlines, supra,* at 18145-149; *Maugnie v. Air France, supra,* ("hazards of air travel"); *Evangelinos v. TWA, supra,* ("air transportation risks"); *Warshaw v. TWA, supra,* ("risks of the air"). Article 17 of the Convention, several courts have declared, imposes absolute liability upon the carrier for all personal injuries regardless of fault, "if the *action* which caused the damage so sustained took place onboard the aircraft.". *Gray v. American Airlines, Inc.* (CA2, 1955) 227 Fed.2d 282, 4 CCH Avi 17811, cert den 350 US 989, 76 SCt. 476. It appears that "accident" was used for fear the airline would otherwise become the absolute medical insurer of passengers. This result was addressed by the Guatemala Protocol, *infra,* by eliminating liability for death or illness from natural causes. This result would also obtain if "risk of flight" were synonymous with accident. In this sense the carrier would be protected from liability for the health of and injury to passengers from causes independent of flight. By contrast, pressure change due to altitude variations is as much an inherent flight risk as is turbulence or any meteorological phenomenon. Injuries proximately caused by such a flight condition are "accidents" within the Convention. Hearing loss due to natural causes and unrelated to flight should not be compensated.

b. *The U.S. and Other Contracting Parties Have Interpreted "Accident" Synonymously With "Risk of Flight"*

It is a prime cannon of treaty construction to look to the subsequent action of the parties for the interpretation of the treaty in areas clearly unanticipated at the time. Article 31(3)(6), Vienna Convention of the Law of Treaties, 8 International Legal Material 679 (1969). The action and specific intent of the United States have consistently favored compensation of passengers injured by the risks of flight while simultaneously advocating increased limitations on liability and the rejection of all carrier defenses based upon its due care and caution. *Maughnie v., supra.* Following its repudiation of the Warsaw Convention and

imposition of the interim Montreal Agreement, this government's position has, without waiver, favored increased passenger protection. The Guatemala City Protocol, signed in 1971 but never formally ratified, evidences such intention. It too would result in absolute liability of the air carrier engaged in international transportation instead of negligence, would materially raise the limitations on the amount of liability contained in Warsaw and Montreal, and would broaden the jurisdiction over carriers set forth in Article 28(1) of the Warsaw system (see generally I Speiser & Krause, *Aviation Accident Law*, *supra*, at p.680-684). Article 17 of the Guatemala Protocol relating to injuries sustained by passengers states: "1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that *the event* which caused the death or injury took place onboard the aircraft or in the course of any of the operations of embarking or disembarking. However the carrier is not liable if the death or injury resulted solely from the state of health of the passenger." (Emphasis added.) A State Department letter explains the Protocol as follows:

> Under this protocol the standard of liability in the case of death or injury to passengers is absolute rather than negligence (Article 17 and 21), thus, even in a case of death or injury arising out of hijacking or sabotage of an aircraft or an act of war the carrier will be liable. The carrier will not be liable in two kinds of cases relating to passengers' state of health or the claimants or passengers' contributory fault. Because the question of liability will generally not be an issue, the only question open normally will be the amount of damage. . . . A primary objective of absolute liability is to assure a high net recovery to claimants by reducing the need for and cost of litigating claims. . . . (Quoted at 1 Speiser & Krans, *Aviation Tort Law*, Section 11:20, Page 683, N.40.)

That the use of the term "accident" was intended to limit carrier liability to injuries caused solely by "risks of flight" is discussed in *Warshaw*:

> The discussion which led to the Guatemala Protocol, as well as the language of the Protocol itself, provide us with the necessary tools to construe the intent of the parties. One portion of the report of the Subcommittee is illuminated with respect to the type of occurrence which was not to be construed as an "accident": "(a)n accident does not include death or illness from natural causes." See, Report of Subcommittee on Revision of the Warsaw Convention as Amended by the Hague Protocol, found in ICAO Doc. 8839-LC/158-1, Report, Par. 7 at p. 2 (1969). The participants of the Guatemala Conference in 1971 were extremely conscious of their obligation to carefully select language that would accurately reflect their understanding. See, Comments of Delegates, (ICAO Doc. 9040-L4 167-1, Agenda Item No. 9 at p. 3 (2-13-1971).)
>
> In the discussion in 1969 relating to potential amendments to Article 20 (liability for damage to baggage), the Reporter, Dr. Swart, noted that "the possibility of making the carrier liable independent of the 'risks of the air' (and independent of fault) is small, because the Convention requires that the damage to passengers should consist of death or injury, caused by an accident which took place onboard of the aircraft, etc. (see Article 17). Moreover the carrier has the possibility to prove contributory negligence on the part of the passenger.
>
> By deleting Article 20 (due care exemption) in respect of passengers, one would therefore make the

carrier only in exceptional cases liable for damage which is unrelated to the 'risks of the air' and to which the carrier has in no way contributed by negligence, e.g., murder or infection by a fellow passenger or a heart attack (accident?)."

Note that indeed subsequent appellate and trial court interpretations have held murder to be an "accident" within the Convention's meaning. The Montreal Agreement compensated murder (terrorist) victims while excluding liability to the perpetrator. This achieves the purposes of protecting passengers regardless of intent, limits the carriers' liability and punishes the wrongdoer.

c. *Common Understanding and Legal Use of "Accident" Compel Imposition of Liability*

In *Warshaw*, relied upon by Air France, District Judge Fogel of the Eastern District of Pennsylvania gathered substantial documentation and citations to reach the conclusion that "the term 'accident' was to be interpreted in its common sense meaning . . .". Relying upon a non-aviation decision of the Third Circuit and an insurance law decision of the Supreme Court of Pennsylvania, he defined accident objectively; the focus was upon the injury producing event.

Had the *Warshaw* court enforced the spirit of the Convention (and properly defined "accident") he would have examined the subjective injuries and actions of the victim-claimant. Upon such examination, if the "untoward event, out of the ordinary" was an unexpected casualty to the person to whom it happened, or had there been an unexpected result or consequence following a normal act or condition, an "accident" should be said to have occurred. The injury

producing mechanism itself should then be examined to determine whether it was a "risk of flight", or merely the result of the state of health or culpability of the passenger. The former is compensable under the treaty, the latter is not.

Local law is utilized within the Warsaw Convention system. While it may be said that a treaty of the United States is the law of the land and overrules any state law which may be in conflict (*Missouri v. Holland* 252 US 416 (1920)), it has equally been said, and is the rule in this circuit, that "the Warsaw Convention does not create a cause of action" *Maugnie v. Air France, supra.* "In other words, the Convention is neutral with respect to the existence of a cause of action and merely conditions and limits any action which exists under otherwise applicable law." *Husserl v. Swiss Air Transport Company* (DCNY 1975) 388 Fed.Supp. 1238, 13 CCH Avi 17603 (*Husserl* II). The treaty itself incorporates local law. Article 21 establishes a contributory or comparative negligence defense in accordance with local law. Article 24(2) (person with right to sue) and Article 28 (Procedure) also incorporate local law. Inclusion and exclusion of evidence, the scope of testimony, experts, etc., are governed by local law, *DeMarines, supra,* 15 CCH Avi at 17298-300. *Husserl II, supra,* specifically concludes that Article 17 "types of injury should be governed exclusively by the substantive law which would be applicable if the treaty did not exist at least in those situations involving no conflict with the convention or where the otherwise applicable law was easily determinable." 13 CCH Avi at 17607.

As did *Warshaw,* both the First Circuit in *MacDonald* and the Third Circuit in *DeMarines* drew upon local, com-

mon law to assist in interpreting words left undefined by the High Contracting Parties. This court has available to it extensive California case law which unequivocally defines "accident" *subjectively,* i.e., from the perspective of the injured. In *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Company* (1959) 51 Cal.2d 558, 563, the highly respected California Supreme Court, per Justice Traynor, stated:

> No all-inclusive definition of the word 'accident' can be given. It has been defined as 'a casualty'—something out of the usual course of events which happens suddenly and unexpectedly and without design *of the person injured.* (*Rock v. Travellers Ins.* 172 Cal. 462, 465; *Richards v. Travellers Ins.* 89 Cal. 170, 175) (*Zuckerman v. Underwriters At Lloyd's,* 42 Cal.2d 460, 473.) It includes *any event which takes place without the foresight or expectation of the person acted upon or effected by the event.* (*Richards v. Travellers Ins.* 89 Cal. 170, 176; see also *Richie v. Anchor Cas. Co.* 135 Cal.App. 455; *Moore v. Fidelity & Cas. Co.,* 140 Cal. App.2d Supp. 967, 971.) An accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or, consequence from either a known or unknown cause. (*Hauenstein v. St. Paul Mercury Indemnity Co.,* 242 Minn. 354 (65 Northwest 2d 122, 126) (Emphasis added).

Citing *Geddes & Smith, Inc., supra,* the California Court of Appeal has also relied upon some logical but less legally binding authorities. In *Cowman v. Department of Motor Vehicles* (1978) 86 Cal.App.3d 851, 853 it held: "An accident is an unexpected happening, a mishap, an unfortunate occurrence (Webster's New World Dictionary of the American Language); an unexpected and undesirable event, anything that occurs unexpectedly or unintentionally (American Heritage Dictionary of the English Language) (1976); an unexpected event (Concise Oxford Dictionary); an unusual event happening without foresight or expectation (Compact Edition of the Oxford English Dictionary); an unforeseen, unplanned event, one occurring by chance, lacking intention (Webster's Third New International Dictionary); a fortuitous circumstance, event, or happening; unusual and *unexpected by the person to whom it happened*; an unusual or *unexpected result* attending the performance of *a usual* or necessary act; some sudden and unexplained event taking place without expectation upon the instant (Black's Law Dictionary (4th Edition))."

Similarly textual material has been relied upon to support the proposition that "accident" is defined from the perspective of the injured. In *Ritchie v. Anchor Casualty Company,* (1955) 135 Cal.App.2d 245, 252-54, the Court reviewed such authorities:

> *Richards v. Travellers Insurance Company,* 89 Cal. 170, discusses the meaning of "accident" as follows, at Page 175: "It is impossible to give a precise definition of the word 'accidental'. As every effect has a cause, there is one sense in which nothing is accidental. . . . But the authorities to be found on the subject seem to be of the point that 'accident' must be given its popular meaning; that is, a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." Then, quoting Judge Withey in *Ripley v. Railway Company,* 2 Bigelow's Life & Accident Insurance cases at 738: "Perhaps, in a strict sense, any event which is brought about by design of

any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly an accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on (claimant's) part. It was to him a casualty, and in the more popular and common acceptation, "accident", if not in its precise meaning, includes: any event which takes place without the foresight or expectation of the person acted upon or affected by the event (emphasis original). . . . I think, in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the context as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract, and are to be held, in the absence of plain unequivocal exceptions and provisions, to the intent what, in popular acceptation, the insured party is likely to understand by its terms. . . . The language of Judge Withey seems to us to express correct the views of the question." (Pages 175, 176). The definition of accident given in the foregoing quotation has been accepted and applied uniformly in this jurisdiction and quite generally in others where the word accident is found without qualifying phrases such as "accidental means". (Citations omitted). We quote *Zuckerman v. Underwriters At Lloyd's, London* 42 Cal.2d 460, 473: "Accident" has been defined as 'a casualty—something out of the usual course of events and which happens suddenly and unexpectedly and without design of the person injured.' (Citations omitted)."

In conclusion, California courts have consistently held: ". . . the term 'accident' denotes an unintended casualty (citations omitted)" (*O'Doan v. INA* (1966) 243 CA2d 71, 77), as "an occurrence which produces hurt or injury: (*Hyder v. Inter-Insurance Exchange*, 77 Cal.App. 343, 348; approvingly quoted in *Maxon v. Security Insurance*, 214 Cal.App. 2d 603, 612 (1963) and *Allesandro v. Mass. Cas. Ins. Co.*, 232 Cal.App.3d 203, 209 (1965) which happens suddenly and unexpectedly and without the design of the person injured and "includes any event which takes place without foresight or expectation of the person acted upon or affected". *Allesandro v. Mass. Cas. Ins. Co.* (1965), 232 CA2d 203, 42 Cal.Rptr. 630; cf *Hogan v. Midland Nat'l. Ins. Co.* (1970) 3 Cal.3d 553 (accord).

There is a clear distinction between injury caused by "accident" and one caused by "accidental means". This distinction is expressed in *Rooney v. Mutual Benefit Health & Accident Assoc.* 74 Cal.App.2d 885, 888: "Where, as here, the policy does not insure against accidental death or accidental injuries, but against death or injuries caused by accidental means, it is not sufficient that the death or injury should be unexpected, but in the means through which the injury was sustained or the death produced there must be something of an unexpected or unforeseen character." As the treaty deals only with an "accident", the unexpected and unforeseeable result of a voluntary normal act fulfills the term of the treaty as to the event covered.

5. *CONCLUSION*

Sudden, unexpected hearing loss sustained by a person not contributorily negligent and caused by a risk, hazard,

or phenomenon intimately associated with flight is an "accident" within the meaning of Article 17 of the Warsaw Convention. Normal pressurization of an aircraft cabin which necessarily occurs upon descent from cruising altitudes of 40,000 feet to landing at sea level is such a circumstance. Loss of hearing proximately caused thereby is such a risk and hazard. This definition of the term gives airlines and passengers in international transportation equal protection of the Warsaw Convention as modified by the Montreal Agreement. It is consistent with the history of these documents and, moreover, with the use and definition of that term accepted almost universally by the courts. Most importantly, such interpretation embodies the spirit and intent of the Treaty and Agreement clearly expressed in the hijack and sabotage cases: limited compensation for injuries sustained due to risks and hazards intimately associated with modern international flight.

WHEREFORE, it is respectfully prayed that this Court grant to plaintiff a partial Summary Judgment by ruling that a loss of hearing proximately caused by operation of the aircraft's pressurization system is an "accident" within Article 17 of the Warsaw Convention, as modified by the Montreal Agreement and that defendant's motion be denied.

DATE: November 16, 1982

ABRAMSON & SMITH

By: Harold J. Truett III

[Certificate of service omitted in printing]

The United States District Court
For the Northern District of California

No.: C 82-0330 EFL

[Title omitted in printing]

[DEFENDANT AIR FRANCE'S]
REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: November 19, 1982

Time: 10:00 am

In her Memorandum of Points and Authorities in opposition to defendant's Motion for Summary Judgment, plaintiff concedes that nothing unusual, unexpected or unanticipated occurred during her flight aboard defendant's aircraft, except the alleged onset of her present hearing loss. Nevertheless, she seeks to argue that defendant may be held liable because the controlling law imposes a system of "absolute liability" and because the term "accident", used in the Warsaw Convention as a predicate to the imposition of liability, must be defined in a broad, subjective fashion. Neither of these contentions has merit, and neither can form the basis for a decision by this Court which would be directly contrary to the well-reasoned decisions in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978), and *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977), relied upon by defendant.

There is no question that, as originally drafted and adopted by the United States, the Warsaw Convention established a liability system based upon concepts of fault.

As stated by the official reporter for the Commission established to draft the Convention:

> The Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third parties must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory.[1]

While based upon concepts of fault, however, the Convention was written so as to give injured passengers the benefit of a rebuttable presumption of carrier liability, so long as their injury is caused by an *accident*. [Warsaw Convention, Article 17.] Article 20(1) provides the carrier with an ability to avoid liability, if "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures".

Dissatisfaction in the United States with the low liability limits of the Convention led, eventually, to what is referred to as the Montreal Agreement of 1966, following the United States' renunciation of the Warsaw Convention. Pursuant to the Montreal Agreement, carriers were allowed to file tariffs with the U.S. Civil Aeronautics Board which maintained liability limits, though at a higher level than under the Warsaw Convention, in return for a waiver of the Article 20(1) due care defenses. [See, generally, Speiser & Kraus, *Aviation Tort Law*, section 11:19, p. 674.]

The effect of the Montreal Agreement is to make the presumption of carrier liability unrebuttable. As noted by plaintiff, some authorities have described the modified system as one of "absolute liability". Such a simplistic formulation can be misleading, however, as demonstrated by plaintiff here. The situation is more accurately described by the court in *Sheris v. The Sheris Co.*, 12 Avi. Cas. 17, 394 (Va. 1972), where the court considered the Warsaw Convention together with the Montreal Agreement and analyzed the combination as "a waiver of certain defenses in return for a limitation of liability in event of an action alleging a breach of duty and damages therefrom". [*Id.*, at 17, 397.]

[1] Miller, G., Liability in International Air Transport (1977), p. 63.

The Montreal Agreement did not modify the Warsaw requirement for an "accident" upon which to predicate carrier liability. Nor did it evolve out of any dissatisfaction with the underlying notion of the Warsaw Convention that liability should be based upon fault though, to be sure, that fault is described in such a way as to greatly favor passenger recovery, once an injury causing accident is found.

Plaintiff's references to the unratified Guatemala Protocol serve only to reinforce defendant's view that under the present system, the regime is not one of unqualified "absolute liability". Indeed, the State Department letter explaining the Guatemala Protocol, cited by plaintiff on p. 8 of her Memorandum, makes it clear that one objective of the Guatemala Protocol is to move from the present system of recovery based upon at least limited adherence to negligence concepts, to one based upon true strict liability.

Precisely because the Guatemala Protocol has not been ratified,[1] its principles have no bearing on the issue at bar, except insofar as they shed light on the *existing* state of affairs by way of contrast.

[1] As noted by Speiser & Krause, the Guatemala Protocol has never been ratified because of the intense disputes it has generated. Aviation Tort Law, section 11:20, p. 681.

Plaintiff's suggestion that California law interpreting the meaning of the word "accident" should be applied is likewise misplaced. The Warsaw Convention is an *international* treaty and, as such, it should be interpreted by all courts in as uniform a manner as possible. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). Thus, strained and convoluted definitions of words have no place in the interpretation of the Convention, when it is so clear from other authorities that a fundamental premise of the Convention would be undercut thereby.

Setting aside for the moment the inapplicability of California law on the present question, the authorities relied upon by plaintiff for her interpretation of the word "accident" are completely inappropriate. *Ritchie v. Anchor Casualty Co.*, 135 C.A.2d 245 (1955), cited at length by plaintiff, does not involve a case of personal injury at all. Rather, it arises out of questions concerning coverage under an insurance policy and an insurer's duty to defend claims made under the policy. Furthermore, the language quoted by plaintiff, such as that an accident is an "unexpected event", merely serves to beg the question.

Nor can plaintiff find comfort in those cases where passengers have been allowed to recover for injuries resulting from sabotage and skyjacking. Such cases, arising from *externally* imposed conditions so far from what a passenger should reasonably expect to encounter on a flight, are simply too factually distinguishable from the present case to provide much guidance. Also, it is significant to note that one of the rationales stated in *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd.* 485 F.2d 1240 (2d Cir. 1973), for finding that injuries resulting

from highjacking were covered by the Warsaw Convention is that "the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents". In other words, there remains an element of fault in the carrier's failure to prevent the highjacking.

CONCLUSION

The Warsaw Convention does not impose absolute, unqualified liability upon carriers for injuries alleged to be little more than temporally related to international air travel. There must be evidence that an injury was *caused* by an "accident".

The requirement for an "accident" to "cause" plaintiff's injury precludes any recovery under the facts of this case. Plaintiff concedes that no unusual, unexpected, abnormal or unintended event occurred in the operation of the aircraft.

No case holds that a passenger can recover for alleged injuries arising out of an uneventful flight. Such a ruling would be contrary to established law, the explicit language of the Warsaw Convention, and the liability framework within which the Warsaw Convention was developed and persists.

Defendant's Motion for Summary Judgment must therefore be granted, and plaintiff's complaint dismissed.

DATED: November 18, 1982.

LILLICK McHOSE & CHARLES

By: /s/ WILLIAM L. ROBINSON
William L. Robinson
Attorneys for Defendant
Air France

In the United States District Court
For the Northern District of California

No. C 82-0330 EFL

[Title omitted in printing]

NOTICE OF APPEAL

[Filed Jan. 18, 1983]

NOTICE IS HEREBY GIVEN that Valerie H. Saks, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in favor of defendant Air France and against plaintiff Valerie Saks entered in this action on January 14, 1983.

DATE: January 18, 1983

ABRAMSON & SMITH

By: HAROLD J. TRUETT III
Harold J. Truett III

[Docket Sheets—District Court]

Date 1982	Nr.	C 82-0330EFL Proceedings Saks vs. Air France
Jan 13	1.	Defendant's petition for removal from Superior Court, City & County of San Francisco (their #785424), no process.
Jan 13	2.	ORDER setting status conference—4-15-82, 9:15 am—ORDER re discovery RFA
Jan 13	3.	Defendant's notice of removal.
Jan 13	4.	Defendant's bond on removal.
Jan 19	5.	Defendant's ANSWER TO COMPLAINT.
Jan 19	6.	Defendant's certificate of service.
		REASSIGNED PURSUANT TO ORDER OF THE ASSIGNMENT COMMITTEE
		MAR 24 1982
Apr 7	7.	ORDER SETTING STATUS CONFERENCE 4-13-82 at 11 am (EFL)
Apr 6	8.	Defendant's Status Conference Statement
Apr 13	9.	MINUTES: 4-13-82 C/R None, Status Conference Case continued to 11-29-82 at 9:30 am for 2-3 day Jury Trial Discovery Cutoff 10-15-82 Witness Summaries, Memo & Points & Authorities to be filed 9-15-82 (EFL)
Apr 20	10.	Defendant Air France's Deposition Notice on James Piepergerdes M.D. Sean R. Althaus, M.D. & Raymond C. Arnold M.D.
May 17	11.	Defendant's Deposition Notices on: Douglas K. Ousterhaut; Donald I. Galen M.D.; James B. Turre M.D.; John R. Moore; Naismith Dental Group; Contra Costa Animal Clinic; Emporium-Capwells; Professional Medical Supply; Acalanes High School; Diablo Valley College
Jun 8	12.	STIPULATION extending time to answer interrogatories for Air France to respond 7-7-82
Jun 11	13.	Defendant Air France's 1st set of Interrogatories

Date 1982	Nr.	C 82-0330EFL Proceedings Saks vs. Air France
Jul 7	14.	Defendant's responses to 1st set of interrogatories & request for production
Sep 17	15.	Plaintiff's Answers to interrogatories
Sep 24	16.	Defendant's supplemental responses to interrogatories & request for production
		(See Sheet A)
Sep 27	17.	Defendant's 2nd set of interrogatories & request for production
Oct 4	18.	Defendant's Deposition Notice on records only, Douglas K. Ousterhault, M.D. / Naismith ental Group / Donald I. Galen, M.D. / James Piepergerdes, M.D. / James B. Turre, M.D. / Raymond Arnold, M.D. / John R. Moore, M.D. / Sean Althaus, M.D. / Acalanes High School
Oct 5	19.	Defendant's Deposition Notice on Ms. J. Herbert—Issued.
Oct 5	20.	Defendant's Deposition Notice on Timothy Cole—Issued.
Oct 20	21.	Defendant Air France Deposition 11-8-82 at 10 am on Dr. Raymond Arnold
Oct 20	22.	Defendant Air France's Deposition Notice 11-9-82 at 10 am on Stephen Billinghurst
Oct 26	23.	Plaintiff's Answers to interrogatories
Nov 5	24.	Defendant Air France Memo in support of motion for summary judgment
Nov 5	25.	Defendant Air France's Notice of Motion for summary judgment 11-19-82 at 10 am
Nov 10	26.	Stipulation that defendant's motion for summary judgment, and any counter-motions which plaintiff may raise in reply, may be heard on 11-19-82, even though this will provide less than 28 days' notice of motion, etc. EFL
Nov 16	27.	Plaintiff's Memo of Points & Authorities re summary judgment—set for 11/19/82 10am

Date 1982	Nr.	C 82-0330EFL Proceedings Saks vs. Air France
Nov 19	28.	MINUTES: 11-19-82 C/R Joe Vickstein, Defendant Air France's motion for summary judgment or partial summary judgment ordered submitted. Plaintiff's motion to continue trial granted. Court: Order: Trial date vacated, New Trial date, if necessary, will be included in written opinion. (EFL)
Nov 22	29.	Defendant Air France's Reply Memo in support of motion for summary judgment
Dec 7	30.	DEPOSITION of Timothy R. Cole 10-15-82 by Teresa Ignagni C/R
Dec 7	31.	DEPOSITION of Jeanne Herbert 10-15-82 by C/R Teresa Ignagni

Date 1983	Nr.	C 82-0330EFL Proceedings Saks vs. Air France
Jan 12	32.	ORDER: Defendant's Motion for Summary Judgment is granted. Entered on civil docket 1-14-83. Copies to counsel of record. (EFL)
Jan 12	33.	JUDGMENT: Entered on Civil Docket Sheet 1-14-83 Copies to counsel Judgment entered in favor of defendant, parties to bear own costs. (EFL)
Jan 24	34.	NOTICE OF APPEAL. Plaintiff Appellant, Fee paid, Copies to counsel of record & to USCA, Designation form for Reporter's Transcript sent—#83 1625
Feb 16	35.	JOINT DESIGNATION OF REPORTER'S TRANSCRIPTS. No Transcripts
Feb 18		Made & Mailed Certificate of record to USCA & to counsel of record.

[Docket Sheets—Court of Appeals]

Date 1983	Filings—Proceedings
Jan 25.	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLANT; COUNSEL FOR APPELLEE. ogm
Feb 16.	Filed aptl's docketing statement. 2/15 CONFATT em
Feb 22.	FILED CERTIFICATE OF RECORD. (N/T) gb
Mar 16.	Filed order (CONFATT, RGRS) (1) the reporter's transcript, if not already designated and ordered, shall be ordered on or before March 18, 1983; (2) aplt shall file a brief of not more than 20 pgs. on or before May 9, 1983; (3) aples shall file a brief of not more than 20 pgs. on or before June 13, 1983; (4) aplt may file a reply brief of not more than 10 pgs within 14 days of the service date of aple's brief. sz
May 10.	Filed as of 5/9/83, Orig & 15 Aplt's Opening brief (19 pgs) and FIVE EXCERPT OF RECORD. 5/9 (No statement of related cases; counsel notified) EM
May 18.	Filed Aplt's Certification of Related Cases (16 copies) RECORDS EM
June 10.	Filed aple's motion for exten. of time to file its brief. 6/10 (CIVATT) sz
June 16.	Filed Order (FARRIS) Appellees motion of June 10, 1983 for an extension of time to Jul 11, 1983 to file the answering brief is denied. The brief shall be filed no later than June 24, 1983. ogm
June 27.	Rec'd orig & 15 copies of aplee's brief. 23p. 6/24 sk Sent letter Re. no proof of service, no statement of related cases, brief is oversized.
July 1.	Recvd Aple's Certification of Interested Parties; certificate of service of aple's brief. (Inserted in aple's brief) EM
July 1.	Filed Aple's motion for acceptance of oversized brief. 7/1 CIVATT EM
July 6.	Filed Order (TANG) Aple's motion for leave to file a brief of 23 pages is denied, and the clerk shall return to aples the brief previously submitted. Aples' alternative request for an extension of time is granted. On or before

Date 1983	Filings—Proceedings
	July 15, 1983 aples shall file a brief not to exceed 20 pages. lw
July 7.	Appellee's briefs returned to counsel per order of 7/6/83. ogm
July 18.	Filed as of 7/13, Orig & 15 Appellee's Corrected Briefs. (20 pgs) 7/12 ogm
July 25.	Filed orig. & 15 copies of aplt's reply brief. (19 pgs.) 7/26 —ot—
Sept 14.	Sent 19(b) letter to both counsel, re: designation of clk's record. ogm
Sept 27.	R'cvd response from aplt's counsel re: record designated on 9/26/83. ogm
Sep 27.	R'cvd ltr/re: aple's designation filed in the DC on 9/26/83. sz
Oct 11.	Filed aplt's motion for continuance of oral argument. PANEL 10/11 lw
Oct 13.	Filed order (WALLACE, SCHROEDER, FERGUSON) The aple's motion of Oct. 11, 1983 for a continuance of oral argument is denied. lw
Oct 14.	ARGUED & SUBMITTED BEFORE: WALLACE, SCHROEDER, FERGUSON, CJJ. lw
1984	
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AMICUS CURIAE

BRIEF

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No. 83-1785

In the Supreme Court of the United States

OCTOBER TERM, 1984

AIR FRANCE, PETITIONER

v.

VALERIE HERMIEN SAKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether an international air carrier is liable under the Warsaw Convention and the Montreal Agreement for an injury or illness sustained by a passenger as a result of normal and anticipated cabin pressure changes.

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On October 1, 1984, the Court invited the Solicitor General to file a brief expressing the views of the United States in this case.

STATEMENT

1. The Warsaw Convention,[1] adopted in 1929, is a multilateral private law treaty ratified by the

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[1] The Convention is officially termed the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000. The United States has been a party to the Warsaw Convention since 1934. Articles 17-25 of the Convention are set forth at Pet. App. 20a-23a.

United States and currently adhered to by over 120 nations. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, No. 82-1186 (Apr. 17, 1984), slip op. 3. The Convention establishes internationally uniform rules governing the air carriage of passengers, cargo, and baggage. Article 17 of the Convention provides that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft" during the course of international travel (Pet. App. 20a). Article 22 limits "the liability of the carrier for each passenger * * * to the sum of 125,000 francs" (*id.* at 21a).[2] Article 20(1) provides that the carrier may avoid the liability attaching under Article 17 upon "prov[ing] that he and his agents [took] all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" (*ibid.*). This provision, commonly referred to as the "due care defense," effectively shifts the burden of proof of negligence from the injured passenger to the carrier. Article 21 permits the carrier to avoid liability under the Convention upon proof that "the damage was caused by or contributed to by the negligence of the injured person" (*ibid.*). Article 25 precludes the carrier from invoking the liability limits set by Article 22 "if the damage is caused by his wilful misconduct" (*id.* at 23a).

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[2] The value of the franc is determined by reference to the official price of gold. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, *supra*. The Article 22 limit converted into approximately $8300 when the United States became a party to the Convention, and since 1972 it converts into approximately $10,000.

In the years following its ratification of the Convention, the United States grew increasingly dissatisfied with the low level of the liability limits established by the treaty. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 504-507 (1967). On November 15, 1965, this dissatisfaction with the liability limits led the United States to issue a notice of its intent to denounce the Convention effective in six months, pursuant to Article 39 of the Convention.[3] At the same time, the United States made known that it was prepared to withdraw the notice of denunciation if the contracting nations would agree to increase the liability limits to approximately $100,000. See S. Exec. Rep. 97-45, 97th Cong., 1st Sess. 2 (1981); *Warshaw* v. *Trans World Airlines, Inc.*, 442 F. Supp. 400, 406 (E.D. Pa. 1977). A diplomatic conference was convened in Montreal in 1966 in an effort to resolve the issue, but it proved unsuccessful. On the eve of the planned denunciation, a compromise measure was proposed by the members of the International Air Transport Association (IATA) (in consultation with representatives of the United States government). This Agreement, known as the Montreal Agreement of 1966 (Agreement CAB 18900, set forth at Pet. App. 24a-26a)), was approved by the Civil Aeronautics Board (CAB) on May 13, 1966 (see 31 Fed. Reg. 7302, set forth at Pet. App. 27a-31a), and

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[3] The Warsaw Convention was modified in certain respects by the Hague Protocol of 1955. The United States, however, declined to ratify the Hague Protocol because it believed that the increase in the liability limits to $16,000 for claims involving death or bodily injury was not sufficient. Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 510-516, 532-546, 564.

the United States withdrew its proposed denunciation of the Convention in light of the Agreement. See generally Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 586-596.[4]

Under the Montreal Agreement, virtually all air carriers conducting international flights into or out of the United States agreed to include in their tariffs a special contract pursuant to which the liability limit for death or bodily injury would be raised voluntarily to $75,000 inclusive of legal fees and costs (or $58,000 exclusive of legal fees and costs) for each passenger.[5] The carriers further agreed to provide in their tariffs that they would waive their right to assert the due care defense provided by Article 20(1) of the Convention. The Montreal Agreement did not, however, waive the carriers' right under Article 21 of the Convention to avoid or reduce liability by proving that the passenger was contributorily negligent. The Agreement also made clear that passengers still retained their right to obtain recovery in excess of the Convention's liability limits where the death or injury was attributable to the carrier's wilful misconduct. See generally 31 Fed. Reg. 7302 (1966).[6]

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[4] The Montreal Agreement is an intercarrier agreement filed with the CAB for its approval under Sections 412 and 414 of the Federal Aviation Act, 49 U.S.C. App. 1382, 1384. CAB approval insulated the Agreement from the operation of the antitrust laws.

[5] The use of such a special contract is specifically authorized by Article 22(1) of the Convention. See Pet. App. 21a.

[6] Efforts to revise the Warsaw Convention have continued. The United States and many other nations have signed the Guatemala City Protocol of 1971 and the Montreal Protocols Nos. 3 and 4 of 1975, but neither of these amended versions of the Warsaw Convention has been ratified by the

2. Respondent was a passenger on a flight operated by petitioner from Paris to Los Angeles on November 16, 1980. During the flight, she suffered

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United States Senate or entered into force. The Guatemala City Protocol amends the Convention by raising the liability limit to $100,000 per passenger. It also makes significant changes in the rules governing liability. See generally Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 Am. J. Comp. L. 335 (1972). First, the Guatemala City Protocol changes the language of Article 17 of the Convention. Instead of stating that the carrier is liable "if the *accident*" occurred during international air travel, the amended section provides for liability "upon condition only that the *event* which caused the death or injury * * *" was incident to travel covered by the Convention. See International Civil Aviation Organization, 2 Documents of the International Conference on Air Law, Guatemala City, ICAO Doc. 9040-LC/167-2, at 189 (Feb.-Mar. 1971). (The significance of this change is discussed at pages 21-24, *infra*.) The new Article 17 also provides a defense if "the death or injury [of a passenger] resulted solely from the state of health of the passenger." *Ibid.* Second, the Guatemala City Protocol eliminates the due care defense for passenger death or injury. Mankiewicz, *supra*, 20 Am. J. Comp. L. at 338. Third, the Protocol deletes the provision of the original Warsaw Convention that permitted the passenger or his representative to seek unlimited liability based on wilful misconduct by the carrier, as well as that provision of Article 22 that authorized the carrier to enter into a "special contract" to raise the limits set by the Convention. *Id.* at 339. The Guatemala City Protocol retains in modified form the carrier's right to plead contributory negligence. *Id.* at 338. Montreal Protocol No. 3, in relevant part, incorporates the preceding amendments made by the Guatemala City Protocol and substitutes the use of an international monetary unit for the gold monetary conversion clause contained in the Convention. See S. Exec. Rep. 97-45, *supra*, at 4; S. Exec. Rep. 98-1, 98th Cong., 1st Sess. 4 (1983). Montreal Protocol No. 4 amends and updates the cargo provisions of the Convention as modified by the Hague Protocol.

The Senate Committee on Foreign Relations has recommended approval of Montreal Protocols Nos. 3 and 4, S. Exec.

a permanent, total hearing loss in her left ear that allegedly resulted from cabin pressure changes during the landing. Respondent filed suit in the United States District Court for the Northern District of California seeking damages for the hearing loss. Pet. App. 16a. The parties agreed that "at all times during the descent the cabin pressurization system of the aircraft operated normally" (*ibid.*; see J.A. 29-30). Thus, in the words of the district court, "[t]he sole question presented * * * [was] whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an 'accident' within the meaning of Article 17 of the Warsaw Convention," hence providing a basis for recovery under the Convention. *Id.* at 16a-17a.[7]

The district court granted petitioner's motion for summary judgment (Pet. App. 16a-18a). Relying on *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), the court held that an ear injury caused by normal cabin pressurization changes was not an "accident" within the meaning of Article 17 of the Convention. Rather, the court concluded that the term "contemplates some unusual event precipitating injury" as a predicate to recovery under the Convention (Pet. App. 17a).

A divided court of appeals reversed (Pet. App. 1a-16a). The court of appeals agreed with the district court that "[a] finding that an 'accident' has occurred

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Rep. 98-1, *supra*, at 5, 6, but they have not yet been ratified. On March 8, 1983, the Senate voted 50-42 to ratify the protocols, falling short of the two-thirds majority needed for ratification. The protocols are still pending in the Senate on a motion for reconsideration.

[7] Respondent has not alleged that she has any cause of action in tort or contract outside the scope of the Convention.

is essential to invoking the provisions of Article 17" (*id.* at 3a). The court reasoned, however, that the existence of an "accident" should be "viewed from the perspective of the person experiencing the injury" (*ibid.*). Looking to the definition of "aircraft accident" contained in 49 C.F.R. 830.2, the court of appeals determined that the term could encompass any death or injury suffered in an " 'occurrence associated with the operation of an aircraft' " (Pet. App. 3a-4a). The court also found that this expansive definition was consistent with the intent of the framers of the Montreal Agreement. The court explained that permitting a carrier to avoid liability on the basis that the injury resulted from normal carrier operation and hence was not caused by an accident "is, in essence, a restatement of the defense of due care" that the carriers have now waived under the Montreal Agreement (*id.* at 4a). Rather, the court held, the Montreal Agreement must be construed as establishing a regime of absolute liability under which the plaintiff need show only that his injury was caused by the operation of the aircraft (*id.* at 7a-10a).

Judge Wallace dissented (Pet. App. 11a-16a). He observed that Article 17 specifically requires an "accident" as a predicate to recovery under the Convention, in sharp contrast to Article 18, which provides for recovery for damage to cargo or baggage on the basis of an "*occurrence* which caused the damage" (Pet. App. 11a (emphasis added)). Judge Wallace agreed with the view expressed by the Third Circuit in *DeMarines*, 580 F.2d at 1197-1198, that recovery under Article 17 requires a demonstration that a passenger's death or injury "was the result of some 'unusual or unexpected happening' " (Pet. App. 12a). Judge Wallace specifically disputed the majority's statement that this approach was inconsistent with

the elimination of the due care defense by the Montreal Agreement, explaining that the requirement of an "accident" under the Convention "has nothing to do with negligence or the lack of it" (*ibid.*).

SUMMARY OF ARGUMENT

A. Article 17 of the Warsaw Convention imposes liability on an air carrier when a passenger suffers death or bodily injury caused by an "accident" on board the aircraft. The courts that have construed the term "accident," other than the court below, have correctly held that it connotes some unusual or unexpected event. See, *e.g.*, *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193, 1196-1197 (3d Cir. 1978). Because respondent's hearing loss was the result of normal and routine changes in cabin air pressure, her injury was not the result of an "accident" and she was not entitled to compensation under the Convention.

The fact that respondent's hearing loss itself was unexpected plainly does not satisfy the terms of the Convention because there was no accident that "cause[d] the damage." And the text of the Convention refutes the court of appeals' suggestion that the term "accident" has no special meaning and should be treated as synonymous with "occurrence"; Article 18 defines carrier liability for damaged baggage in terms of an "occurrence," thus establishing a looser standard for liability than in the case of bodily injury and making clear that the two words embody distinct concepts.

Moreover, construing the term "accident" in Article 17 to require that the injury be caused by an unexpected event is fully consistent with the overall structure of the Warsaw Convention, which makes liability

turn on the negligence of the carrier, either proven or presumed. By contrast, the court of appeals' creative interpretation makes the carrier liable for every injury suffered on board an aircraft. This no-fault liability regime cannot be squared with the Convention as a whole or the intention of the drafters.

B. The entry of the Montreal Agreement in 1966 did not create liability for injury suffered on a routine flight. The Agreement did not alter the terms of the Warsaw Convention; it was simply a contractual arrangement in which carriers agreed to waive two specific rights: (1) the liability limits of the Convention (up to $75,000); and (2) the due care defense of Article 20(1). The carriers did not waive the "accident" requirement of Article 17.

The court of appeals plainly erred in reaching beyond the specifics of the Montreal Agreement to find that it was generally intended to create a scheme of no-fault liability. Although the Agreement did facilitate recovery in some cases in the absence of negligence by eliminating the carriers' right to rebut the Convention's presumption of negligence, it plainly did not contemplate guaranteed recovery for every injury suffered during an international flight. For example, the Agreement preserved the contributory negligence defense of the Convention.

The Montreal Agreement was designed to increase the level of recoveries for injuries covered by the Convention and to provide prompt resolution of claims. These purposes were advanced by the elimination of the due care defense, but they have no application where the injury occurs on a routine flight and the liability regime of the Convention is not triggered at all. Neither the signatories nor the United States government, which helped to develop the Montreal Agreement, intended that the Agreement establish a

health insurance system for every injury occurring on board an aircraft.

C. The subsequent actions of the Warsaw Convention signatories at the Guatemala City Conference in 1971 confirm that the term "accident" in Article 17 requires that an unexpected happening cause the injury. The Protocol adopted in Guatemala City (but not yet in force) amends Article 17 to refer to an "event" rather than an "accident." The delegates universally recognized this change as an expansion of the scope of liability provided under the original Convention, and their discussions of the issue reflected their understanding that the term "accident" connotes some unexpected event.

ARGUMENT

THE WARSAW CONVENTION DOES NOT ESTABLISH CARRIER LIABILITY FOR AN INJURY CAUSED BY THE NORMAL OPERATION OF AN AIRCRAFT

The court of appeals held in this case that an air carrier is liable for an injury suffered by a passenger during a routine international flight—here, for a hearing loss caused by the normal, expected cabin pressure changes made in preparation for landing. This holding rested on the conclusion that the Warsaw Convention, together with the Montreal Agreement, impose on air carriers a regime of complete no-fault liability (see Pet. App. 7a-12a). This conclusion is manifestly erroneous. It is quite clear that the Convention does not establish such no-fault liability, and its requirement that the injury result from an "accident" does not permit recovery when no unexpected event occurs. The Montreal Agreement, while it waives as a matter of contract certain specified carrier defenses provided by the Convention and thus permits recovery in some cases where the carrier is not negligent, does not alter the threshold prerequisite to recovery that an "accident" cause the injury.

A. An "Accident" Giving Rise To Carrier Liability Under Article 17 Of The Warsaw Convention Must Involve Some Unusual Or Unexpected Happening

As with a statute, the plain language of the treaty itself is the primary source for resolving questions of interpretation that arise under it. *Maximov* v. *United States*, 373 U.S. 49, 54 (1963). Article 17 of the Convention, the article that establishes prima facie liability for death or bodily injury suffered by a passenger, provides that a carrier is liable for damages "if the accident which caused the damage so sustained took place on board the aircraft * * *." Clearly, there can be no recovery under the Convention unless the injury is caused by an "accident" that occurs in connection with the flight. In common usage, the word "accident" connotes an unusual or unanticipated event. See, *e.g.*, *Landress* v. *Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 496 (1934); *Ketona Chemical Corp.* v. *Globe Indemnity Co.*, 404 F.2d 181, 185 (5th Cir. 1969); *Koehring Co.* v. *American Automobile Insurance Co.*, 353 F.2d 993, 996 (7th Cir. 1965). A routine flight in which the operation of the aircraft is normal in every respect would not ordinarily be considered one in which an airplane "accident" occurred, and thus Article 17 should not be construed to establish carrier liability when a passenger suffers injury on such a flight because of his own unique state of health. See *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193, 1196-1197 (3d

Cir. 1978); *MacDonald* v. *Air Canada*, 439 F.2d 1402, 1403-1404 (1st Cir. 1971); *Warshaw* v. *Trans World Airlines, Inc.*, 442 F. Supp. 400, 410 (E.D. Pa. 1977).

The court of appeals acknowledged that "[a] finding that an 'accident' has occurred is essential to invoking the provisions of Article 17" (Pet. App. 3a). The court remarked, however, that whether an "accident" has occurred should be "viewed from the perspective of the person experiencing the injury" (*ibid.*); because respondent's hearing loss was unexpected, the court apparently concluded that it should be deemed caused by an "accident." This approach is fatally flawed because it simply searches for an "accident" in the abstract—finding it here in the injury itself—and ignores the text of Article 17. The Warsaw Convention plainly contemplates that the "accident" occur in the flight itself or the activities associated with the flight, because Article 17 refers to an accident that *causes the injury*. Terming the hearing loss itself an "accident" does not satisfy Article 17, because there is no happening that can even arguably be called an "accident" that caused the injury. In short, the plain terms of Article 17 do not permit the question of liability to turn on whether an "accident" has occurred from the perspective of the person experiencing the injury.[8]

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[8] The court of appeals' approach makes the term "accident" completely meaningless in this context. Presumably, the only situation in which an injury would not result from an accident is one where the passenger expected to be injured on the flight—for example, if respondent had been informed by a doctor before boarding that the cabin pressure changes would be likely to damage her hearing. In a case like that, the carrier obviously would not be liable because of the contributory negligence defense of Article 21.

The court of appeals also supported its statutory interpretation by looking beyond the common understanding of accident to the particular definition of "aircraft accident" set forth in 49 C.F.R. 830.2. That regulation defines the term as "an occurrence associated with the operation of the aircraft * * * in which any person suffers death or serious injury * * *." As Judge Wallace noted in dissent (Pet. App. 11a-12a), however, this definition is for purposes of National Transportation Safety Board (NTSB) reporting requirements; it has no discernible bearing on what meaning the framers of the Warsaw Convention intended for the term.

Indeed, the conclusion drawn by the court of appeals from the NTSB definition—that "accident" in Article 17 simply means "occurrence" (see Pet. App. 3a-4a)—is refuted by the text of the Warsaw Convention itself. Article 18 of the Convention prescribes carrier liability for lost or damaged baggage "if the *occurrence* which caused the damage so sustained took place during the transportation by air" (see Pet. App. 20a). Given the general similarity in language between Articles 17 and 18, it is almost inconceivable that the framers of the Convention did not intend the words "accident" and "occurrence" to embody distinct concepts. See *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 (1981). Indeed, a committee of the International Civil Aviation Organization (ICAO) has flatly stated that the standard governing carrier liability for damaged or lost cargo and baggage "is much looser as a result of the fact that the Convention requires only an '*occurence* [*sic*] instead of an 'accident' * * *." International Civil Aviation Organization, 1 Report of the Subcommittee on Revision of the Warsaw Convention *as Amended by the Hague Convention, reprinted in* ICAO Doc. 8839-

LC/158-1 at 231, ¶ 8 (Sept. 2-19, 1969) (emphasis in original). Accordingly, the text of the Convention strongly indicates that Article 17 establishes liability for death or bodily injury to a passenger only if an unexpected event causes the injury, not if the injury, because of the state of the passenger's health, is occasioned by routine international travel.

Moreover, the interpretation of the court below is out of harmony with the basic framework of the Warsaw Convention. The liability regime of the Convention is a fault-based one, clearly not one of strict liability. Article 17 does create a prima facie case of carrier liability when an accident causes injury to a passenger. But Article 20(1) specifies that the carrier may avoid liability entirely by proving that it exercised due care in conducting its operations. And Article 21 permits the carrier to avoid liability by demonstrating that the injured passenger was contributorily negligent. Thus, the Convention effectively establishes a presumption that the carrier is responsible for the accident that causes the passenger's injury—analogous to the initial inference or presumption of negligence created by the doctrine of res ipsa loquitur—but it is a presumption that may be rebutted by a showing of due care or contributory negligence.

In short, the Warsaw Convention liability regime was designed basically as a burden-shifting scheme under which liability remains based on the "negligence of the carrier," either proven or presumed. See Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. of Air L. & Com. 217, 236 (1959); see generally Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 558-559. It deviates from standard tort law in the shifting of the burden of proof of due care to the carrier, thus relieving the plaintiff of the

need to prove negligence, but it plainly does not create a regime of strict liability. Against this background of a system based on negligence and fault, there is no reason to believe that the framers of the Convention intended the term "accident" in Article 17, contrary to its common meaning, to establish carrier liability for all harms incurred by passengers incident to air travel. The creative reading adopted by the court of appeals simply fails to give the treaty "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purposes." *Wright* v. *Henkel*, 190 U.S. 40, 57-58 (1903).

B. The Montreal Agreement Did Not Alter The Threshold Requirement Of Article 17 That An "Accident" Cause The Injury

The court of appeals recognized that the Warsaw Convention "established a fault-based system for carrier liability" (Pet. App. 5a), but the court concluded that the Montreal Agreement converted that system into one of no-fault liability that permits recovery for an injury caused by the routine operation of an aircraft. This analysis completely misperceives the scope of the Montreal Agreement, expanding it well beyond the bounds intended by its signatories. The Warsaw Convention is a treaty of the United States and thus represents the supreme law of the land. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203 (1942). The Montreal Agreement is merely a contractual agreement among carriers; it is "not a treaty, did not amend the terms of the Warsaw Convention multilaterally, and was not required to be, nor was in fact ratified by the United States Senate." *Warshaw* v. *Trans World Airlines, Inc.*,

442 F. Supp. at 408. While the carriers could and did waive in the Montreal Agreement some of their rights conferred by the Convention, they could not alter the terms of the treaty itself; that is exclusively the province of the sovereign nations that are parties to the treaty.[9]

Therefore, it is essential to examine the precise terms of the Montreal Agreement in order to assess its relevance to this case. In the Agreement (Pet. App. 24a-26a), for international flights with a stopping or take-off point in the United States, the carriers agreed to waive: (1) the Convention's liability limit for death or bodily injury, extending it to $75,000, and (2) the due care defense available under Article 20(1) of the Convention (*id.* at 24a). That is all. The Montreal Agreement did not purport to alter the "accident" requirement of Article 17 (and, indeed, could not have done so), and the carriers did not contractually agree to accept liability in cases not covered by Article 17. Accordingly, respondent is entitled to recover here only if her injury was caused by an "accident" within the meaning of Article 17 as intended by the original drafters of the Warsaw Convention.

Moreover, in addition to reaching beyond the text of the Montreal Agreement, the court of appeals plainly erred in finding that its purpose was to create a regime of complete no-fault liability. Regardless of the correct interpretation of the word "accident" in Article 17, it is undeniable that the Agreement did

[9] These waivers, of course, are binding on the carriers as a matter of contract. However, contrary to the court of appeals' statement (Pet. App. 7a), the Montreal Agreement is not "binding on * * * the United States" like the Warsaw Convention.

not waive the carrier's right to avoid or reduce liability by proving contributory negligence. Thus, the Montreal Agreement clearly contemplated that a passenger could be injured on a flight, yet not be entitled to recover from the carrier.[10] Given this fact, it is difficult to understand why the court of appeals believed that the Montreal Agreement would be undermined in any way by giving "accident" in Article 17 its ordinary meaning and allowing a carrier to be free from liability for a passenger injury caused by the routine operation of the aircraft.

The court of appeals stated that to deny recovery here—on the basis of the "accident" requirement of Article 17—because the injury was a result of normal carrier operations would revive the due care defense waived in the Montreal Agreement (Pet. App. 4a). But there is no incongruity in eliminating the due care defense (and thereby permitting recovery in the absence of negligence), while maintaining the requirement that the injury be caused by an abnormal incident of flight. The Warsaw Convention, in the event of an "accident" that injures a passenger, establishes a rebuttable presumption that the injury was due to negligence of the carrier. The Montreal Agreement eliminates the opportunity to rebut that presumption, but that does not create a no-fault insurance scheme or suggest that one is appropriate. The policies underlying the waiver of the due care defense in the Montreal Agreement were to provide prompt resolution of claims under the Convention and to reduce the litigation costs of recovery. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 600.

[10] Indeed, this is true even if, unlike here, the carrier is partly at fault.

In a case such as this one, where there was no unexpected event causing the injury that could even arguably be attributed to negligence by the carrier, the liability provisions of the Convention should not be triggered at all, and the reasons underlying the waiver of the due care defense are inapposite. Thus, permitting recovery under the Convention only in cases where the injury results from an unexpected event is fully consistent with the waiver of the due care defense in the Montreal Agreement.

The court of appeals pointed to no evidence even suggesting that the framers of the Montreal Agreement intended to go beyond the abolition of the due care defense to create a right of recovery for every injury incurred in connection with an international flight. In fact, there was no such intent. In preparing this brief, the Solicitor General consulted with the Departments of State and Transportation, the two executive departments that represent the interests of the United States in negotiations involving the Warsaw Convention. These departments have informed us that the court of appeals misconstrued the intent of the United States government in helping to develop the Montreal Agreement; the government's objective was not to bring about a health insurance system whereby carriers would be liable for every injury caused by routine aircraft operations, but rather simply to obtain higher limits of carrier liability with a minimum of litigation (by requiring waiver of the due care defense).[11] In particular, it was not the intent of our representatives to alter the

[11] The views of these departments were conveyed in a letter from Deputy Assistant Secretary of State Franklin K. Willis and Warren L. Dean, Assistant General Counsel for International Law, Department of Transportation.

Warsaw Convention requirement of an "accident," which means an unusual or unexpected event that caused the injury.[12]

Other courts to consider the question presented here have recognized that the Montreal Agreement should not be construed to establish carrier liability for an injury attributable to routine operation of the aircraft. In *Warshaw* v. *Trans World Airlines, Inc.*, *supra*, for example, the plaintiff suffered a hearing loss due to normal repressurization of the cabin during flight. See 442 F. Supp. at 404, 413. The district court held that the injury was not caused by an "accident" within the meaning of Article 17 because it did not result from an unexpected event, and accordingly it ruled that the carrier was not liable. *Id.* at 407-413. The court specifically rejected the contention that the Montreal Agreement effected a change in the existing "accident" requirement of Article 17. *Id.* at 408. The district court's decision in *Warshaw* was followed by the Third Circuit in *DeMarines* v. *KLM Royal Dutch Airlines*, *supra*. In that case, the plaintiff suffered a permanent loss of equilibrium ascribed to the pressurization of the aircraft. Finding no basis for concluding that there was any abnormality or unexpected occurrence in the cabin pressurization,

[12] Respondents have noted (Br. in Opp. 15-16) that the State Department used the term "absolute liability" in characterizing the system established by the Montreal Agreement. This term was used (perhaps too loosely) to refer to the fact that recovery was now available in the absence of negligence because of the agreement to waive the due care defense. It was never suggested that the Montreal Agreement extended liability to cases where the Warsaw Convention liability regime did not even apply because of the absence of an "accident" within the meaning of Article 17.

the court of appeals held that there was no "accident" that could give rise to recovery under Article 17. See also *MacDonald* v. *Air Canada*, 439 F.2d at 1403-1404. And the Third Circuit has recently adhered to its interpretation of the "accident" requirement, despite the contrary view of the court below. *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130, 133 (1984).

The court of appeals rejected this line of cases as "out of step with the Montreal Agreement" (and other recent decisions) because they apply a "restrictive, negligence-based definition of 'accident'" (Pet. App. 10a). This mischaracterization of the Third Circuit's view as "negligence-based" simply ignores the significant difference between the requirement that the injury be caused by something other than the routine operation of the aircraft and the prior requirement—eliminated in the Montreal Agreement—that the injury be caused by the negligence of the carrier. The Third Circuit's interpretation of the accident requirement is fully consistent with the decisions relied on by the court below (see Pet. App. 7a-9a) that recognize liability under the Convention for extraordinary events such as terrorist attacks or hijackings. See *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), cert denied, 429 U.S. 890 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973). Such events are "accidents" within the meaning of Article 17 because they are abnormal and unexpected; in light of the Montreal Agreement the carrier can no longer escape liability by showing that the "accident" did not result from its negligence. The threshold requirement of "accident" in Article 17, however,

remains unchanged. See *Evangelinos*, 550 F.2d at 154; *Day*, 528 F.2d at 33; *Husserl*, 351 F. Supp. at 706 (noting that plaintiff bears burden of proof on this issue).

C. The Subsequent History Of Proposals To Amend The Warsaw Convention Confirms That Article 17 Does Not Establish Liability For Injuries Caused By The Routine Operation Of An Aircraft

It is generally recgnized that "treaties are construed more liberally than private agreements," and it is appropriate to "look beyond the written words" to the post-ratification conduct of the parties in ascertaining their proper meaning. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943). See also *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, No. 82-1186 (Apr. 17, 1984), slip op. 15-16; *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160-163 (1934). In this instance, it is the conduct of the Warsaw Convention signatories with respect to later negotiations to amend the Convention that is relevant. Article 17 was the direct focus of a series of meetings by the ICAO that led to the adoption of the Guatemala City Protocol, which amended Article 17 in significant part. See note 6, *supra*. These meetings and the action taken by the negotiators cast considerable light on the meaning of the term "accident" in Article 17. See generally *Warshaw* v. *Trans World Airlines, Inc.*, 442 F. Supp. at 410-412.

At Guatemala, the ICAO agreed after intensive deliberations to change the language of Article 17 providing for liability for passenger injury "if the *accident*" causing the injury occurred during the flight or associated embarking or disembarking. The Gua-

temala City Protocol replaced that provision with the rule that the carrier "is liable * * * upon condition only that the *event* which caused the death or injury" took place during the flight or associated embarking or disembarking, subject to the further proviso that "the carrier is not liable if the death or injury resulted solely from the state of health of the passenger." See. S. Exec. Rep. 98-1, 98th Cong., 1st Sess. 28 (1983) (emphasis added). The substitution of the word "event" for "accident" in the Guatemala City Protocol was universally recognized by the delegates as an expansion of the scope of the carrier's liability as it existed under the Convention. See Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 Am. J. Comp. L. 335, 337-338 (1972); S. Exec. Rep. 97-45, 97th Cong., 1st Sess. 35 (1981); *Warshaw*, 442 F. Supp. at 411-412 (and authorities cited therein). See also ICAO, Minutes of the Second Meeting of the Commission of the Whole, ICAO Doc. 9040-LC/167-1, at 31 (1972) (statement of the delegate of Mexico) (characterizing amendment as a "change in the system of liability"). If the court below were correct that the version of Article 17 contained in the original Convention already conferred carrier liability for all injuries occurring in international travel, these extensively debated substantive amendments to Article 17 would be completely superfluous.

Indeed, the discussions leading to the adoption of the change in Article 17 clearly reflect the drafters' understanding that an "accident" under the original Article 17 connotes some unexpected event apart from the normal operation of the aircraft. The Italian delegate to the Commission of the Whole explained, without objection, that a proposal to reinstate the

term "accident" in place of the term "event" in the latest draft amendment would "make it clear that the objective liability of the carrier would be engaged only in the case of an abnormal event directly connected with air transport operations." ICAO Doc. 9040-LC/167-1, *supra*, at 44, ¶ 30.[33] The same delegate linked the concept of an "accident" to a "malfunctioning of the service." *Id.* at 32, ¶ 8. The Swedish delegate, referring to the choice between the words "accident" and "event," stated that "the word 'accident' was too narrow" because the carrier might appropriately be held liable for acts that could not be considered "accidents." *Id.* at 34, ¶ 17.[34]

In addition, the delegates to the Guatemala City conference discussed the scope of carrier liability under the revised version of Article 17 in connection with a fact situation analogous to the one before the Court in this case. See ICAO Doc. 9040-LC/167-1, *supra* at 31-50. The delegate of New Zealand posed the hypothetical of "a passenger [who] died from fright on an aircraft caught in clear air turbulence." The delegate suggested that, under the amended Article 17, which in addition to substituting "event" for "accident" provided for no liability where the death or injury "resulted solely from the state of health of the passenger," "the carrier should not be liable in those circumstances." *Id.* at 31, ¶ 1. The delegate of the United Kingdom disagreed, stating that, "[w]ith regard to the example * * * of the passenger with a

---

[33] This proposal was opposed by the delegate of the United States because it might lead to additional litigation on the question whether a particular event was an "accident." *Id.* at 45, ¶41.

[34] The proposal to reinstate the word "accident" was defeated by a vote of 35-10. *Id.* at 47, ¶ 2.

weak heart whose death was precipitated by clear air turbulence, his Delegation felt that the airline should carry the responsibility in border-line cases." *Id.* at 32, ¶ 7.

This discussion plainly indicates that the Guatemala City delegates would not have understood the unamended Warsaw Convention to establish liability in this case. The New Zealand hypothetical is closely analogous to the facts here—a passenger, because of his unique state of health, suffers an injury because of the routine operation of the aircraft.[18] Yet the delegates characterized this situation either as one in which there should be no liability (New Zealand) or as a "border-line case" in which there should be liability under the amended Article 17 (United Kingdom). If such a situation would present no more than a "border-line case" under the substantially expanded liability scheme adopted in Guatemala City, it is manifest that it does not give rise to liability under the original provisions of the Warsaw Convention still in effect in the United States, which explicitly require as a predicate to recovery that an "accident" cause the injury.

In the absence of a voluntary agreement by the carriers to waive the "accident" requirement, a change in this liability regime requires the approval of the Executive Branch and the Senate. It cannot be made on the basis of the court of appeals' view concerning appropriate cost allocation (cf. Pet. App. 7a-8a).

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[18] To the extent there are differences between the two fact situations, they suggest that carrier liability would be more appropriate in the New Zealand hypothetical than in this case. Clear air turbulence is not encountered on every flight and, at least theoretically, the pilot might be capable of avoiding it. By contrast, normal cabin pressurization changes are a guaranteed part of any flight.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AIR FRANCE,

Petitioner,

VS.

VALERIE HERMIEN SAKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT, VALERIE HERMIEN SAKS

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December 18, 1984

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QUESTIONS PRESENTED

1. Is a passenger's total and permanent hearing loss proximately caused by a risk inherent in air travel and through no fault of the passenger a compensable injury under the Warsaw Convention as modified by the Montreal Agreement?

2. Where a passenger asserts a claim against an international air carrier for injuries proximately caused by the airplane's operation but has no claim under the Warsaw Convention, is summary judgment proper without consideration and determination of the passenger's state law claims?

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No. 83-1785

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT VALERIE HERMIEN SAKS

Respondent Valerie Saks respectfully submits this brief on the merits.

TREATY AND INTERNATIONAL AGREEMENT INVOLVED

This case concerns the construction and purpose of the Warsaw Convention, concluded October 12, 1929, 49 Stat. 3000, reprinted at 49 USC § 1502, note, and, in particular, Article 17 thereof which provides in full:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

This case also concerns the extent to which the provisions of the Warsaw Convention have been modified by the Montreal Agreement involving Air France and other international airlines landing in the United States. As a signatory to that agreement, Air France agreed that it:

> shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Air France's waiver of the defense in Article 20(1) of the Warsaw Convention prevents Air France from defending itself with proof that it has "taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Articles 17-25 of the Warsaw Convention and the Montreal Agreement are set forth at Pet. for Cert. App. 20a-26a.

STATEMENT OF THE CASE

Respondent Valerie Hermien Saks, a passenger on an Air France flight from Paris to Los Angeles, brought an action for damages, alleging a total loss of hearing in one ear as a result of the change in cabin pressure upon the airplane's descent to land in Los Angeles, California.

The Complaint

Ms. Saks filed a complaint in the Superior Court of the State of California, County of San Francisco, alleging the negligence of defendant Air France but making no reference to the Warsaw Convention. Joint Appendix 2 (hereinafter "JA").

The Summary Judgment

After removal of the case to the District Court, Air France filed a motion seeking summary judgment and dismissal of the complaint or, "if said motion is not granted, defendant Air France will move in the alternative for an Order granting partial summary judgment." JA 8. Air France asserted that the depressurization of the cabin from 6,300 feet to sea level upon descent to Los Angeles was normal and that there were "no malfunctions or mechanical problems of any sort," establishing, in the view of Air France, that Ms. Saks had not been injured as the result of an "accident" and therefore her claim was barred under the Warsaw Convention. JA 8-16. Air France's motion did not attempt to obtain summary judgment upon any state law claims that Ms. Saks might have for negligence, including the negligent failure of Air France to warn her of the danger of hearing loss from normal cabin pressurization, or the negligence of Air France in utilizing a cabin pressurization system which, even in its "normal" operation, would pose an unreasonable risk of injury to passengers.

In support of the motion for summary judgment, Air France submitted excerpts of the deposition of Valerie Saks. Contrary to Air France's attack on the evidence at page 2, n.2 of its Brief, the testimony of Valerie Saks supplies substantial evidence that her permanent left ear hearing loss was caused by the change in cabin pressurization during the plane's descent to land at Los Angeles. She stated that within 5 or 10 minutes of the aircraft's descent, she experienced "extreme pain in my ears, pressure in my head, pressure in my ears. . . . It was very sudden . . . " She tried everything she could do to relieve the pressure, including "[b]lowing my nose, chewing gum, yawning, plugging my nose and blowing," but none of these measures helped. The next day, she discovered her hearing loss when she could not hear the dial tone on the telephone. She thought this condition "would clear," but when it did not, she saw a doctor five days after the flight and he diagnosed her problem as "a total hearing loss in my left ear." JA 22-25.

The sole ground of Air France's motion was that Ms. Saks' loss of hearing resulting from a "normal" change in cabin pressurization did not constitute an "accident" within the meaning of the Warsaw Convention. The District Court entered an Order stating, without recognition of any state law claims, that the "sole question presented to this Court is whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an "accident" within the meaning of Article 17 of the Warsaw Convention . . . " Pet. for Cert. 16a-17a. The District Court took the view that no "accident" was involved because "nothing unusual occurred in the operation of the aircraft. ¶ Accordingly, defendant's motion for summary judgment is granted." Pet. for Cert. 17a-18a. On the same day the District Court entered judgment in favor of defendants and against plaintiff. Excerpts of the Clerk's Record in the Ninth Circuit, p. 35. This was error because Ms. Saks' state law claims for

negligence, incuding negligent failure to warn passengers of the risk of hearing loss from "normal" changes in cabin pressurization, survive if the Warsaw Convention does not apply.

The Ninth Circuit Reversal

The Ninth Circuit Court of Appeals reversed the summary judgment. Following the definition of "accident" adopted by the International Civil Aviation Organization (ICAO) the reigning organization in international aviation, and by the United States Government as "an occurrence associated with the operation of an aircraft," the Ninth Circuit found that Ms. Saks had suffered an accident. Moreover, the Ninth Circuit ruled that the history of the Warsaw system, including the United States' denunciation of the Warsaw Convention and the resulting Montreal Agreement eliminated the airlines' due care defense and imposed absolute liability (1) to accomplish "quick, less-expensive settlements," (2) to "distribute among all passengers what would otherwise be a crushing loss to victims and their families," and (3) to place the loss upon the airline who "could best prevent injuries from occurring." Pet. for Cert., 7a-8a. The Ninth Circuit also relied upon the numerous decisions holding that hijacking or terrorist activities were "accidents" permitting recovery under the Warsaw Convention even though, contrary to Air France's contention before this Court, those incidents did not involve any sudden or unusual operation of the aircraft. Pet. for Cert. 8a-10a.

SUMMARY OF ARGUMENT

The Ninth Circuit's reversal of the summary judgment against Ms. Saks was proper for several reasons.

First, under the prevailing definitions established by the International Civil Aviation Organization and

adopted by the United States, "accident" means "an occurrence associated with the operation of an aircraft." In the international aviation community the term "accident" has never been defined in the narrow manner for which Air France contends to require a sudden and unusual incident in the operation of the aircraft. To Ms. Saks, the pain in her ear and consequent hearing loss was both sudden and unexpected, and was clearly an occurrence associated with the operation of the aircraft. She therefore satisfied the sole definition of "accident" in the international aviation community.

Second, the integrity of the Warsaw system requires a comprehensive definition of "accident" so that any claimant suffering injury caused by the operation of the airplane will come within the liability limits of the Warsaw Convention. The result for which Air France contends will have the deleterious consequence of excluding from the Warsaw Convention those types of injuries which are caused by the operation of the aircraft but which do not result from a sudden and unexpected aspect of the aircraft's operation. Surely, it was not the intent of the framers of the Convention that the limitation on liability should not apply to some injuries caused by the operation of the aircraft. The result for which Air France contends in this Court will create uncertainty for insurers, increase litigation, and reduce net recoveries to passengers, all contrary to the intent of the Warsaw framers.

Third, the operative term for compensable injuries under the Warsaw Convention is not "accident," but "damage." The universal use of the term "damage" throughout the Convention in reference to personal injuries, as well as the history of the Preliminary Draft of the Convention and the proceedings of the Convention itself indicate that "damage" is the controlling term, and "accident" is not a term of limitation but merely a term of description. If this Court agrees with Air France's effort

to give the term "accident" controlling effect and at the same time a narrow definition, then the result will be that owners of goods and baggage will have a greater right to recovery for "damage" from an "occurrence" under Article 18 than do persons under Article 17. Air France has pointed to nothing in the Warsaw proceedings that would support such an unconscionable preference for property over persons.

Fourth, the Montreal Agreement imposes absolute liability on the airlines for injuries, such as Ms. Saks' hearing loss, which are caused by the operation of the aircraft, without regard to fault. Ms. Saks is not attempting to make Air France an insurer of her health, for she is not seeking damages for an injury which she caused, nor which is attributable in any respect to her ill health. She only seeks compensation for damage caused by the operation of the aircraft. The Ninth Circuit properly ruled that she is entitled to compensation for such damage under the Montreal Agreement.

Fifth, the Warsaw Convention was a unique event in legal history whereby international airlines, many of them owned in part or in whole by their national governments, utilized the international political process to reduce their risks and to limit their liability for those reduced risks. The terms of carriage in international air travel under the Warsaw Convention, therefore, should be construed broadly in favor of the passenger and against the airline.

Sixth, this Court, as the Supreme Court of the United States, should interpret the Convention in a manner consistent with improved airline safety and with the efforts of the United States over the past 30 years to expand the passengers' right to damages from international airlines.

Seventh, Air France is barred from invoking the limitation of "accident" in the Warsaw Convention because the Ticket Advice to Passengers as modified by the Montreal

Agreement did not give Ms. Saks sufficient notice that her recovery for injuries against Air France would be limited to sudden and unexpected events in the operation of the aircraft.

Eighth, regardless of this Court's conclusions as to the interpretation of the Warsaw Convention, the summary judgment below was properly reversed because the order granting summary judgment addressed only Ms. Saks' claims under the Warsaw Convention and ruled that the Convention did not apply. The Court could not enter judgment against Ms. Saks', however, without making an adverse determination of her state law claims for negligence, including failure to warn that hearing loss is an inherent risk of air travel.

For these reasons, the Ninth Circuit's reversal of the summary judgment in favor of Air France was proper and should be affirmed.

ARGUMENT

I

THE DECISION BELOW PROPERLY PERMITS MS. SAKS TO RECOVER UNDER THE WARSAW CONVENTION FOR HER TOTAL AND PERMANENT HEARING LOSS PROXIMATELY CAUSED BY THE CHANGE IN CABIN PRESSURIZATION DURING DESCENT.

The Ninth Circuit properly reversed the summary judgment against Ms. Saks because (1) the sole definition of "accident" in the international aviation community is "an occurrence associated with the operation of an aircraft," and (2) the operative requirement for compensation under the Warsaw Convention is not "accident," but "damage."

A. The Decision Below Properly Held That a Loss of Hearing Caused by a Change in Cabin Pressurization Was an "Accident" Under the Warsaw Convention.

The Ninth Circuit properly held that Ms. Saks' loss of hearing caused by repressurization of the Air France cabin upon descent to land was an "accident" under the Warsaw Convention. As shown below, there is only one definition of the term "accident" in the international aviation community. It provides that an accident is "an occurrence associated with the operation of the aircraft," which Ms. Saks' hearing loss clearly was. This definition of "accident" has also been adopted by the United States. Moreover, the integrity of the Warsaw system requires a comprehensive definition of "accident" to ensure that any damage caused by the operation of the airplane will be subject to the liability limitations of the Warsaw Convention. Air France asks this Court to carve out an exception to the Warsaw system with respect to injuries that were not caused by a sudden and unexpected event in the operation of the aircraft, thus increasing local law litigation outside the Warsaw limits with the resulting uncertainty for insurers, difficulties of proof and delay and expense attendant to international litigation, and the reduction of net recoveries to passengers, contrary to the intent of the Warsaw framers.

1. "Accident" Is Defined by ICAO and the United States as "An Occurrence Associated With the Operation of the Aircraft," Embracing Hearing Loss Due to Cabin Depressurization.

The only definition of "accident" in the international aviation community is that set forth by the International

Civil Aviation Organization (ICAO).[1] Annex 13 to the ICAO Convention defines "accident" as follows:

> *Accident.* An occurrence associated with the operation of aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all persons have disembarked, in which: (a) a person is fatally or seriously injured as a result of: — being in the aircraft . . . *except* the injuries are from natural causes, self-inflicted or inflicted by other persons . . .

The ICAO definition of "accident" should be given great weight because ICAO is in fact the heir to the

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[1] The International Civil Aviation Organization was created in Chicago in 1944. 3 CCH Avi. L. Rep. ¶ 28,013. Among the purposes of creating ICAO was agreement:

> on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner. . . . Id.

The Chicago Convention dealt with sovereign rights to airspace, the nationality of aircraft, "measures to facilitate air navigation" (including investigation of air accidents), documentation of aircraft, and rules of the air, traffic control, airworthiness, and "investigation of accidents."

The Chicago Convention came into force in April 1947, having been effectuated by the requisite 26 governments. It has been ratified or adhered to by over 110 countries. France adhered to the Convention on March 25, 1947 and the United States adhered to the Convention on August 9, 1946. 3 CCH Avi. L. Rep. ¶ 28,010. ICAO is a permanent international organization with headquarters in Montreal, Quebec, Canada. S. Speiser & C. Krause, 1 Aviation Tort Law § 11:3, p. 632. Several of the aims of ICAO have a direct bearing on the comprehensive definition of "accident" in Annex 13, including the "safe . . . growth of international civil aviation," "aircraft design and operation for peaceful purposes," meeting "the needs of the people of the world for safe . . . air transport." Article 44, 3 CCH Avi. L. Rep. ¶ 28,013. ICAO is specifically mandated by the Convention to "adopt . . . international standards and recommended practices and procedures dealing with . . . investigation of accidents." Article 37 (k). *Id.*

organization (CITEJA) that gave birth to the Warsaw Convention. C. Rhyne, International Law and Air Transportation, 47 Mich. L. Rev. 41, 53 (1948). After the creation of ICAO in Chicago in 1944, CITEJA held a final meeting in Montreal in 1947 for its own liquidation, with its work henceforth to be carried on by the Legal Committee of ICAO. *Id.*

The ICAO definition has been adopted almost verbatim by the United States:

> "Aircraft accident" means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. 49 C.F.R. § 830.2

These definitions of "accident" are consistent with decisions that impose liability for risks inherent in air travel. One court has ruled that ear injuries from a change in cabin pressure during descent supports a claim under the Warsaw Convention. *Philios v. Transcontinental & Western Air, Inc.* (N.Y. City Ct) [1951] NYLJ 2357 [1953] US Av. 479, cited in Annot. 75 A.L.R.2d 848, 850 (1961); *accord*, Rullman v. Pan American World Airways, 471 N.Y.S.2d 478 N.Y. Sup. Ct. 1983) (accident requires only "that a passenger incident involve some risk connected with aviation")

Air France promotes a definition of "accident" that requires an "unusual or unexpected occurrence" in the operation of the aircraft. But such a definition flies in the face of established authority which finds an event caused by foreseeable and ordinary means to be an "accident" so long as it was unusual and unexpected from the standpoint of the injured person.

For example, because it is unexpected to the plaintiff that a drunk airline passenger would fall upon the plaintiff, one court has held that the plaintiffs' injuries are compensable under the Warsaw Convention:

> Although the alleged cause of the accident, the continued availability of alcohol on the plane, may not have been accidental, the proper focus is on what happened to the passenger. Consequently, this Court concludes that an accident occurred when the fellow passenger fell unexpectedly upon the plaintiff. *Oliver v. Scandinavian Airlines System*, 17 Avi. 18,283, 18,284 (D. Md. April 5, 1983).[2]

This Court has agreed that, unless liability is expressly limited to "accidental means," an unexpected injury such as Ms. Saks' hearing loss is an "accident." In *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1934), this Court stated that "accident could refer simply to an unforeseen and extraordinary *result* even though caused, as in this case, by foreseeable and ordinary means." [emphasis added]

Regarding insurance benefits for accidental death, this Court suggested that if liability had been predicated simply upon *accidental death* as a *result*, without reference to external accidental means, the policy benefits would have been payable because the beneficiary had established that the death, like Ms. Saks' injury,

> was accidental in the understanding of the average man—that the result of the exposure "was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident." 291 U.S. at 496.

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[2] *Accord*, Black's Law Dictionary 14 (5th ed. 1979): *Accident* . . . [A]n event which . . . is unusual and unexpected *by the person to whom it happens* (emphasis added).

Because the prevailing definition of "accident" in the international aviation community is "an occurrence associated with the operation of an aircraft," this is the definition that should guide this Court in determining what the High Contracting Parties would intend today by use of the term "accident." Such a definition is consistent with the usage by the United States, and in American law. Moreover, Air France can supply no other definition of "accident" from any international aviation source. As shown in the next section, a definition of "accident" that embraces a sudden and unexpected injury from the passenger's standpoint is the only definition that will preserve the integrity of the Warsaw system and thereby fulfill the intent of the framers who sought to create one uniform standard of rules for all liability of international airlines.

2. The Requirement of a Sudden and Unexpected Event in the Operation of the Aircraft Would Undermine the Warsaw System by Creating Uncertainty for Insurers, Increasing the Expense of Litigation, and Reducing Net Recoveries to Passengers.

One of the principal purposes of the Warsaw Convention was to create certainty for airlines and their insurers as to what risks would be covered, and to limit liability for those risks. By suggesting a narrow interpretation of "accident" that would exclude Ms. Saks' hearing loss as incident to the "normal" operation of the aircraft, Air France would undermine the Warsaw Convention by creating a class of injuries not subject to Warsaw, and therefore not subject to its liability limits. If Air France prevails, then courts throughout the country will be plunged into the "Serbonian Bog" of discerning whether the means through which the passenger was injured were sudden and unexpected from the standpoint of the airline or the operation of its aircraft. Litigants will be put to the

time and expense of such proof, far more complex than merely establishing "an occurrence associated with the operation of the aircraft."

The purpose of the Warsaw Convention was to lessen litigation and, by defining the scope and amounts of airline liability, afford a more definite basis for establishing insurance rates, thereby reducing premiums and benefitting passengers. As Secretary of State Cordell Hull stated in transmitting the Convention to the Senate in 1934:

> It is believed that the principal of limitations of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.[3]

The proceedings of the Warsaw Convention shows that certain delegates supported absolute liability for injuries to both persons and goods or baggage which could be insured against with certainty and which would encourage the growth of this infant industry by assuring the passenger of financial security. One French representative, Mr. Flandin, urged that passengers should not be discouraged from air travel by any impediments to recovery for aviation injuries. Mr. Flandin commended the existing practice on the Paris to Berlin route of providing

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[3] Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73rd Cong., 2nd Sess. 3-4 (1934), quoted in *Reed v. Wiser*, 555 F.2d 1079, 1089, (2nd Cir. 1977).

with the ticket "a certificate of insurance . . . free of charge by the operating airlines." Second International Conference on Private Aeronautical Law, Minutes, 40 (R. Horner and D. Legrez, Trans.) (1975).

Shortly after the Warsaw Convention, one authority explained that the use of the term "accident" with reference to personal injuries was only intended to exclude injuries inflicted by passengers, but not to exclude injuries "related with the carriage." D. Goedhuis, National Air Legislations and the Warsaw Convention, 199 (1937). Goedhuis suggests that the term "accident" be interpreted:

> in such a way that the only accidents which can be considered as being regarded by Article 17 are those which are *related with the carriage.* It will then be for the passenger to establish the connection between the accident and the operation of the aircraft. Goedhuis, *op. cit.* at 200. (emphasis added)

Goedhuis notes that the term "occurrence" is used with respect to the carriage of goods because passengers cannot damage goods, so that the term "accident" was not needed to avoid airline liability for such damage. Goedhuis, *op. cit.*, p. 201.

Significantly, Goedhuis nowhere suggests that the term "accident" requires proof of an unusual and unexpected event in the operation of the aircraft.

Federal courts have recognized that "accident" should be interpreted to embrace all risks inherent in air travel, thereby providing the certainty sought by insurers and capital investors in international aviation. As the Second Circuit Court of Appeals stated in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975):

> The Warsaw drafters wished to create a system of liability rules that would cover all the hazards of air travel. Cf. Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air. L. 1, 20 (1936); Calkins, The Cause of Action Under the Warsaw Convention, 26 J. Air. L. 217 (1959).

Adopting a flexible formula to determine whether terrorism victims were "embarking," the *Day* court recognized that the airlines' narrow construction of "embarking" would be at odds with the intent of the framers because it would splinter claimants and their actions between the Warsaw Convention and local law. Therefore, the *Day* court rejected the carrier's narrow construction of "embarking":

> Under TWA's test, many claims relating to liability for the hazards of flying would be excluded from the Warsaw system and would be governed by local law. Rather than serving the drafters' intent of creating an inclusive system, appellant's proposal would frustrate it. 528 F.2d at 38.

Moreover, the *Day* court recognized that the willingness of courts to include new risks inherent in air travel within the Warsaw system would promote the vitality of civil aviation:

> The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. Our holding today confirms the framers' belief that the ever-changing needs of the system of civil aviation can be served within the framework they created. 528 F.2d at 38.

Subsequently the Second Circuit reiterated its belief that it is more promotive of the Warsaw Convention to

find a claim to be subject to the Convention rather than not:

> To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose [of limited liability] behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees' damages in excess of the Convention's limits . . . . [O]ur function . . . should be to interpret these provisions in a manner that will carry out the framers' intent. *Reed v. Wiser*, 555 F.2d 1079, 1089-1090 (2d Cir. 1977).

The *Reed* court therefore ruled that suits against airline employees were subject to the Warsaw Convention.

Similarly, where a passenger fell from an open door while waiving good-by as the loading ramp was being pulled away ("normal" operation), one District Court ruled that the incident was within the Warsaw requirement of "on board the aircraft" because "[t]o hold otherwise would be an unwarranted dissection of minute and almost indefinable areas from the coverage of the Convention." *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611, 613 (S.D.N.Y. 1955).

Thus federal courts have consciously given a broad construction to the terms of the Warsaw Convention in order to afford airlines and their insurers the certainty and the limitation of liability which the Convention was designed to guarantee. The interpretation of "accident" for which Air France contends is contrary to the established approach of federal courts in applying the Warsaw Convention, and will defeat the framers' intent, as previously shown.

Moreover, there is nothing extraordinary about providing compensation for injuries from entirely "normal" forces which had an unexpected and unintended adverse

effect on the plaintiff. The provision for compensation for such injuries has long been established under the "egg-shell skull" rule, wherein the defendant is held liable for the death of a man who suffered a bruise that would normally cause only a bump on the head. *Dulieu v. White* [1901] 2 K.B. 669, 679, discussed in W. Prosser, Law of Torts 262 (4th ed. 1971). *Accord, Spivey v. Battaglia*, 258 So.2d 815 (Fla. 1972) (defendant liable for hugging plaintiff, causing paralysis on left side of face and mouth). If Air France prevails, then an irrational distinction among passengers suffering injuries from the air travel will be created. The passenger scalded by hot coffee spilled because of perfectly foreseeable and normal air turbulence can recover, but the passenger who suffers hearing loss because of perfectly foreseeable and normal changes in cabin pressurization cannot recover. *Helfet v. Pan American World Airways*, 12 Avi.17,247 (N.Y.Sup. Ct. 1972) (passenger's right to recover under Warsaw Convention for injuries from air turbulence not disputed).

In addition, it is the duty of this Court to interpret the Warsaw Convention in accordance with the original intent of the treaty: to provide a uniform system of recovery to cover all risks of air travel. As this Court has stated:

> This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect. *Kolovrat v. Oregon* (1961) 366 U.S. 186, 193.

The Warsaw Convention has to be construed as to further its purposes to the greatest extent possible, even if that entails rejecting a literal reading.[4] *Benjamins v.*

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[4] "In construing [a] treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose . . . we proceed under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to the rights

British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. den.* 439 U.S. 1114.

Contrary to the assertion of Air France, the Ninth Circuit, by including inherent risks of air travel within the term "accident," did not substitute its own policy judgment for that of the drafters of the Warsaw Convention. The Ninth Circuit merely pointed out, as did a noted authority on the subject, that the authors of the convention:

> merely intended to equitably allocate the "risks of air navigation" among air carriers and their clients. Mankiewicz, 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention, 38 J. Air L. and Com. 519 at 532 (1972).

The Third Circuit recently acknowledged that Ms. Saks could recover for her hearing loss because her injury was "proximately caused by the risks inherent in air travel." *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984). Finding that Abramson's hernia attack, "unlike a hearing loss from cabin depressurization, is not a risk either associated with or inherent in aircraft operation," 739 F.2d at 133, the Court of Appeals ruled that summary judgment was properly rendered against plaintiff on his Warsaw Convention claim. *Abramson* supports the ruling of the court below, which is premised upon the fact that Ms. Saks' hearing loss was caused by a hazard of air travel. Air France loudly proclaims a supposed conflict between the Third Circuit and the Ninth Circuit. But Air France fails to acknowledge that in the two Third Circuit decisions discussed below, either different facts were involved—specifically an ill passenger with a history of prior-hearing problems and ear surgery—or the Court simply did not reach a holding on the point here in issue.

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claimed under it, the latter is preferred." *Board of County Commissioners v. Aerolineas Peruanas*, 307 F.2d 802, 806-807 (5th Cir. 1962).

In *Warsaw v. Trans World Airlines, Inc.*, 442 F.Supp. 400 (E.D.Pa. 1977), the plaintiff was suffering from an upper respiratory tract infection at the time of the flight and had prior ear surgery. Upon landing he was unable to clear a blockage in his left ear, with resulting permanent damage to the nerve and complete loss of hearing in the left ear. The Court found that the plaintiff's eustachian tubes were blocked by mucous and the swollen linings of the tubes because of the plaintiff's illness.

Upon these facts, the District Court denied liability, concluding that the event that damaged plaintiff's hearing was not an accident because it resulted "solely from the state of health of the passenger and is unconnected with the flight." 442 F.Supp. at 412. A fair reading of *Warsaw* shows that, unlike Ms. Saks' injury, it was the plaintiff's own health problems that contributed to his injury, which supported the court's conclusion that the normal functioning of the aircraft could not constitute "an accident" within the Warsaw Convention.

Air France also relies on *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), but this decision also does not hold that injuries from inherent risks of air travel are not "accidents" under the Warsaw Convention. Plaintiff obtained judgment against KLM for an injury suffered during a change in cabin pressurization. Addressing the question of whether or not the plaintiff had proved an "accident" within the meaning of the Warsaw Convention, the Court of Appeals for the Third Circuit did *not* reach a conclusion on this question. Because the Court of Appeals did not consider the illness and prior surgery suffered by the plaintiff in *Warsaw*, it did state that it found that case difficult to distinguish from *Warsaw*. Nevertheless, the Court of Appeals did not decide that plaintiff's evidence was not sufficient to go to the jury because the defendant had not timely moved for directed verdict after presentation of all the evidence and

and therefore was unable to assert error in the denial of its request for a judgment n.o.v. after the jury's verdict for plaintiff.

Thus it is consistent with the design of the Warsaw system to distribute among all passengers the risks inherent in air travel, as the above federal decisions have recognized.

Moreover, the increased costs in insurance which the airlines will pass on to the travelling public will amount to very little. For example, when the Montreal conference considered increasing the liability limit to $100,000, an increase of over $90,000 from the original Warsaw limit of $8,300, British and American sources agreed that a liability limit of $100,000.00 per passenger would generate an insurance cost of slightly under $1.00 per 1,000 passenger-miles, as compared with a cost of somewhere between 30 and 45 cents per 1,000 passenger-miles under Warsaw. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv.L. Rev. 497, 566 (1967).

Recognizing the minimal increase in cost from spreading among all passengers the risks inherent in air travel, the representative of the International Union of Aviation Insurers put the issue of increased insurance costs in its proper perspective at the Montreal conference:

> In conclusion, we feel that the passenger legal liability coverage is a relative small proportion of the overall operating costs of an airline against its revenue and that by and large far too much emphasis has been put upon the aspect of insurance costs. 1 Montreal Proceedings 140, quoted in Lowenfeld and Mendelsohn, *op. cit.* 567.

In contrast to the few pennies to be paid by air travelers for an inclusive definition of "accident," this Court should consider the enormous burden to courts and

litigants from having to litigate and resolve, under Air France's position, whether an injury arose from a sudden and unexpected event in the operation of the aircraft. Is an objective test or a subjective test to be employed in determining whether an event is sudden and unexpected? Should the testimony of the flight crew be conclusive, or is this an issue for expert opinion based on the experience of all international airlines? Which party bears the burden of proof on this issue? Should parties and courts be saddled with the delay and expense involved in discovering and proving facts that may involve several countries and several languages?

Justice Cardozo recognized decades ago that the search for a definitive test to determine "accident" would necessarily founder because in nature there is no such thing as an "accident":

> The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog.[5] "Probably it is true to say that in the strictest sense in dealing with the region of physical nature there is no such thing as an accident." [Citation] *Landress v. Phoenix Mutual Life Ins. Co.,* 291 U.S. 491, 499 (dissent).

Justice Cardozo cited English authority to support his conclusion that death from sunstroke was "accidental" because it was an "unlooked-for mishap."[6]

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[5] "A gulf profound as that Serbonian Bog . . . where armies whole have sunk." J. Milton, Paradise Lost, Book II, No. 1. 592.

[6] "In my view, this man died from an accident. What killed him was a heatstroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death." *Ismay, Imrie & Williamson,* [1908] A.C. 437, 439 (per Loreburn, L.C.). Quoted at 291 U.S. 499.

In summary, federal courts have consistently held that injuries from inherent risks of air travel are accidents within the Warsaw Convention, and neither *Warsaw* nor *DeMarines* holds to the contrary. Moreover, there is every reason why injuries from inherent risks of air travel should be compensable as "accidents" under the Warsaw Convention. The airlines' desire for certainty and for limited liability will be satisfied, not thwarted, by this Court's holding that hearing loss from normal changes in cabin pressurization are compensable under the Warsaw Convention. One expert on international aviation law has explained that the term "accident" covers all personal injuries "related with the carriage." Federal courts have consistently extended Warsaw to injuries arising from risks inherent in air travel, particularly, as will be shown below, in light of the Montreal Agreement. Unless this Court wishes to plunge courts and litigants into the morass of discovering and proving in light of some not-yet-articulated standard that a particular injury was or was not caused by a sudden and unexpected event from the standpoint of someone other than the injured passenger, the reversal of the summary judgment against Ms. Saks should be affirmed. The cost to the travelling public from an affirmance will be a few pennies per thousand passenger miles. The cost to injured passengers, to courts and litigants, and to the integrity of the Warsaw system, from a reversal of the Ninth Circuit's decision, on the other hand, will be enormous.

B. The Warsaw Convention Entitles Passengers to Recover for "Damage . . . On Board the Aircraft;" "Accident" Is a Term of Description, Not Limitation.

The operative term for carrier liability in the Warsaw Convention is "damage," not "accident." Article 17 states that the carrier "shall be liable for *damage* sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if

the accident . . . took place on board the aircraft. . . ." (emphasis added). Articles 20 and 21, providing the defenses of due care and contributory negligence, respectively, are also phrased in terms of "damage" and not in terms of "accident."

Thus, the operative provisions establishing carrier liability and prescribing defenses to such liability with respect to due care and contributory negligence, all center on the term "damage." If the framers of the Convention had intended "accident" to be the essential focus of liability, then they could easily have framed the due care defense in terms of the carrier's proof of taking "all necessary measures to avoid the *accident*." The framers could have drafted the contributory negligence defense in terms of the carrier's proof "that the *accident* was caused by or contributed to by the negligence of the injured person." However, they did not do so. Finally, in Article 19, the carriers are liable "for damage occasioned by delay in the transportation by air of passengers, baggage, or goods," without any requirement that the delay be caused by an accident.

The origins of the Warsaw Convention lie in the Paris (1925) and Warsaw (1929) International Conferences on Private Air Law held at the instance of the Comite Internationale Technique d'Experts Juridique Aerien (CITEJA). C, Rhyne, International Law and Air Transportation, 47 Michigan L. Rev. 41, 53 (1948). Evidence of the framers' intent that "damage" be the operative term of the Convention is found in the Preliminary Draft of the Convention adopted by the CITEJA during its third session in May, 1928. That draft stated in Article 21 as follows:

> The carrier shall be liable for *damage* sustained during carriage:
>
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;

(b) in the case of destruction, loss, or damage to goods or baggage;

(c) in the case of delay suffered by a traveler, goods, or baggage.

Warsaw Minutes, pp. 264-265.

None of the delegations brought to the Convention any proposal to limit the scope of liability for personal injury in Draft Article 21 to "accidents." Warsaw Minutes, p. 264.

As explained below, the insertion of the terms "accident" and "occurrence" into new Articles 17 and 18 occurred because of a difficulty facing the delegates, not over the scope of liability for personal injury, but over the impossibility of applying the same definition of "period of carriage" to both persons and baggage.

The preliminary draft submitted by CITEJA contained Article 20, which defined the period of carriage as extending from the moment when travelers, goods or baggage enter the aerodrome of departure to the moment they leave the aerodrome of destination. Warsaw Minutes, p. 264. However, a single definition of the period of carriage for both goods and passengers presented difficulties to the Convention delegates who saw that travelers may operate independently both before they have boarded the aircraft and when they depart the aircraft at an intermediate stop. The French delegate, Mr. Ripert, among others, pointed out that "we will never succeed in putting them [goods and passengers] in the same formula." Warsaw Minutes, p. 73.

When for this reason the Convention rejected the proposed Article 20, modification was required of Article 21 which had simply provided that "the carrier shall be liable for damage sustained during carriage" for travelers, baggage, and in the case of delay. Because the rejection of

Article 20 required new attention to defining "the period of carriage" with respect to passengers and baggage, it was understood that the rejection of Article 20 would necessarily require changes in the wording of Article 21 and for that reason the modification of Article 21 to comply with the modification of Article 20 was referred to the Drafting Committee. Warsaw Minutes, p. 84. The concerns of the delegates were resolved by creating Article 17 that limited liability for "damage" to passengers that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking," while liability for "damage" to goods or baggage existed if the damage "took place during the transportation by air."

There is no indication in the Warsaw Minutes that the delegates sought, by employing the terms "accident" for personal injuries and "occurrence" for damage to goods or baggage, to limit liability for personal injuries to incidents involving the sudden and unexpected operation of the airplane. A more likely conclusion is that the framers intended a comprehensive definition for liability in both instances so that the airlines would enjoy the liability limits of the Convention. Therefore, the most reasonable explanation is that the framers used the term "occurrence" in connection with goods or baggage because the term "accident" could conceivably exclude theft, obviously a major cause of loss.

Because there is no dispute that Valerie Saks suffered "damage . . . on board the aircraft" that was caused by a risk inherent in flight, the Ninth Circuit's reversal of summary judgment against Ms. Saks was proper and should be affirmed.

II

UNDER THE MONTREAL AGREEMENT INTERNATIONAL AIRLINES ARE LIABLE FOR ALL DAMAGE PROXIMATELY CAUSED BY THE OPERATION OF THE AIRCRAFT.

Permitting Ms. Saks' recovery for the loss of her hearing due to one of the hazards of air travel is proper under the current position of France and the United States as reflected in the Montreal Agreement and under modern theories of accident cost allocation. The Montreal Agreement "provides decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

As a result of the woefully inadequate monetary limits of recovery under the Warsaw Convention ($8,300), the State Department, on November 15, 1965, filed formal notice of denunciation of the Warsaw Treaty to take effect six months later in the event that the principal international air carriers failed to agree to raise the liability ceiling to $75,000.00. Following the United States' formal notice of denunciation, the world's major airlines signed the Montreal Agreement, (1) raising the liability limit to $75,000.00 on all flights to, from, or stopping over in the United States and (2) waiving the defense of due care provided under Article 20(1) of the Warsaw Convention. Pet. for Cert., p. 24(a).

In criticizing the Ninth Circuit, Air France overlooks the consistent willingness of federal courts to interpret "accident" in light of the Montreal Agreement from the passenger's standpoint, without regard to the fault or unexpected conduct of the airline, its equipment or personnel. The most prominent example is hijacking. Federal courts have uniformly held that a hijacking constitutes an

"accident" supporting recovery under the Warsaw Convention and the Montreal Agreement, even though a hijacking is clearly intentional and not "accidental" in the sense of being inadvertent, and even though there may be no evidence that the airline was at fault, or that its personnel made mistakes or that the airplane malfunctioned in a sudden or unexpected way.

For example, in *Husserl v. Swissair Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd mem.* 485 F.2d 1240 (2d Cir. 1972), the District Court held that a hijacking is "an accident" within the meaning of Article 17 of the Warsaw Convention. Although the airline argued that the cause of the plaintiff's injuries was intentional misconduct and therefore not "an accident," the District Court noted that the intention of the United States as reflected in the statements of its government did not at all emphasize the word "accident" but stressed the imposition of "absolute liability" by the Montreal Agreement.

> It is significant that press releases of the State Department and the order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier. 351 F.Supp. at 706.

Moreover, The District Court noted that the only specific exception to liability provided in the Montreal Agreement was "in respect of any person who has willfully caused damage." The District Court therefore drew the inference that persons injured in any other fashion apart from willfully causing damage would be able to recover, even for the acts of sabotage by others to the aircraft. 351 F.Supp. at 707.

Finally, the District Court was motivated by the "policy underpinnings of the Warsaw Convention."

> The Warsaw Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents, since it physically controls the aircraft and access to it; it is likewise the party most capable of assessing and insuring against the risks associated with air tranportation; finally, it is the party most able to distribute efficiently the costs of the first two steps. 351 F.Supp. at 707.

Similarly, with regard to the plaintiff's injury from the pressurization of the cabin, certainly the airline is in the best position to protect passengers from injury from pressurization, the airline is the party most capable of assessing and insuring against the risks of hearing loss from pressurization, and the airline is the party most able to distribute efficiently the costs of the previous safeguards.

The policy of accident cost allocation motivated the Court of Appeals for the Second Circuit to adopt a broad interpretation of the term "accident." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). The court in *Day* ruled that a hijacking was an accident and that the plaintiff passengers were within the course of embarking at the time they were assaulted in the terminal. The court was motivated to reach these conclusions by:

> modern theories of accident cost allocation. The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become "accident" victims. [Citation.] Equally important, this interpretation fosters the goal of accident prevention. 528 F.2d at 34.

Finally, the Court noted that recovery under the Warsaw Convention should be preferred to the alternative method of a costly suit in a foreign country involving not only the additional expense and inconvenience but also the requisite proof of fault that would "unduly postpone payments urgently needed by the seriously injured victim or his surviving dependents." 528 F.2d at 34.

After examining the denunciation by the United States of the Warsaw Convention that led to the Montreal Agreement, the Court of Appeals in *Day* stated that the Warsaw Convention:

> now functions to protect the passenger from the many present-day *hazards of air travel* and also spreads the accident cost of air transportation among all passengers. [Citation.] This is amply demonstrated by the imposition of *absolute liability* and the establishment of greatly increased limits of liability. . . .
>
> We conclude, in sum, that the *protection of the passenger* ranks high among the goals which the Warsaw signatories now look to the Convention to serve. 528 F.2d at 37 (emphasis added).

Accord, *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc).

If the international infliction of harm by third parties qualifies as an "accident," without any showing of airline negligence or malfunction, surely an innocent passenger's loss of hearing, which is sudden and unexpected to both the passenger and the airline, must also qualify as an accident under the preceding cases.

III

THE WARSAW CONVENTION SHOULD BE INTERPRETED IN LIGHT OF ITS HISTORY AND IN LIGHT OF IMPROVEMENTS IN AVIATION SAFETY SINCE 1929.

The Warsaw Convention is a unique legal document. It should be interpreted in light of its history and in light of changed conditions in the aviation industry since 1929. The Warsaw Convention is the result of the efforts of international airlines, many owned in whole or in part by their national government, to utilize the international political process to define and limit their liabilities. Nowhere in American common law is there any precedent for an entire industry to limit its own liability in this fashion. Moreover, since 1929 the airline industry has grown from infancy to maturity, with attendant improvements both in the financial strength of international airlines and in airline safety. The financial impact from liability for injuries proximately caused by the inherent risks of air travel is miniscule. As a branch of the government of the United States, this Court should interpret the Warsaw Convention in the broad manner which the United States has consistently asserted for the benefit of passengers during the past 20 years.

A. The Warsaw Convention Was A Unique Legal Event Whereby International Airlines Utilized the International Political Process To Reduce Their Risks To Enhance Their Insurability.

The task of interpreting the Warsaw Convention must take into account the identity of interest between the national representatives to the Warsaw Convention and the international airlines whose liabilities the Convention defined and limited.

The intimate relationship between foreign governments and their flagship air carriers is seen from the substantial

government subsidies to, and in some cases outright ownership of, air carriers. For example, in the early 1920's, the British government allowed an annual maximum subsidy of beween 10,000-15,000 British pounds per airline. In addition, the British government made grants of aircraft and engines up to 28,500 British pounds with an additional contribution of 15,000 British pounds to each airline representing 30% of the cost of purchasing aircraft and engines during the fiscal year 1923-1924. The French government subsidized its airlines in 1923 to the amount of 28,000,000 francs. The Dutch Airline, KLM, had two-thirds of its losses supported by the government from 1920 to 1923. For the years 1923-1926, the Dutch government made loans to the airlines. The government had control over the airlines finances with government accountants controlling the company's books and with the government nominating a member of the Board of Directors. The Danish airline operated with a government subsidy. The German government from 1920 to 1922 voted 2,000,000 marks to subsidize its carriers. The German government also made available a free supply of gasoline to its airlines, the unused portion of which the airlines were permitted to sell at a profit. T. Kennedy, An Introduction to the Economics of Air Transportation, 115-132 (1924). Deutsche Lufthansa was created in January 1926 with the German government holding 36% of the initial capital stock. R. Davies, *A History of the World's Airlines*, 93 (1964). Air France was formed in 1933 by an amalgamation of four airlines with the government owning 25% of the stock. Id. at 56.

The dependence of the infant airlines upon national governments has been explained by one writer as follows:

> In the 1920's and 1930's government policy played a large part in helping private airline companies through their faltering, experimental stages. . . . In the early days, technical factors leading to high costs

> made airlines generally uneconomic by ordinary market standards. Governments were willing to support them for reasons of national prestige and defence [sic], and for their usefulness in opening up remote areas for settlement and exploitation.

D. Corbett, *Politics and the Airlines*, 17 (1965).

Consequently, this Court should recognize that the Warsaw Convention resulted from an alliance of financially intertwined national governments and international airlines, who were primarily concerned with the interests of the airlines, not the passengers.[7]

The enthusiasm of the international air carriers for the Warsaw Convention is reflected in a 1933 communication from the Commerce Department to the Secretary of State:

> All United States operators conducting international air transport services strongly favor adherence to the Convention by the United States . . . The Aeronautical Chamber of Commerce of America, the Trade Association Organization representing 90% of all United States transport operators and 100% of those operating internationally, strongly favors participation in the Convention. No airline operating at the present time has indicated opposition to adherence to the Convention by the United States.

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[7] Indeed, the presence of The Republic of France as an amicus curiae is a continuing indication of the solicitude of national governments for their flagship air carriers. The brief of the United States is remarkable only for its complete failure to explain how its position in favor of Air France can be squared with the United States' consistent effort for several decades to expand the liability limits and relax the defenses provided in the Warsaw Convention. Indeed, the Brief of the United States admits that the United States has since 1955 sought to increase recovery for passengers under the Warsaw Convention. Brief of the United States at 3 n.3 (Hague Protocol), 3-4 (Montreal Convention), 4 n.6 (Guatemala Protocol).

Quoted in A. Lowenfeld and A. Mendelsohn, *op. cit.*, p. 502 (1967).

The Warsaw Convention should be recognized and interpreted for what it was—a mutual aid pact between international airlines and their governments, thought to be necessary to enable the airlines to attract capital and obtain insurance during their infancy. Protection of the passenger has never been reported as a paramount concern of the Warsaw framers. Consequently, this Court should not hesitate, when an ambiguity arises, to resolve that ambiguity in favor of the passenger.

An interpretation favorable to the passenger is supported by the rule that the construction of a treaty should favor the rights claimed under it. For example, in *Maschinenfabrik Kern, A.G. v. Northwest Airlines*, 562 F.Supp. 232 (N.D. Ill. 1983), the plaintiff shipper sought recovery for damages to duplicating machines. The airline defended on the ground that notice had not been given to the airline as required under Warsaw Convention Article 26(2). The District Court held that notice to the destination carrier was sufficient because the defendant Northwest was one carrier in the chain. The District Court accepted the plaintiff's "liberal construction" under which Article 26 is satisfied by giving notice to any of the successive carriers involved in a single transportation of goods.In embracing this liberal construction, the District Court followed the rule of treaty construction that:

> In construing [a] treaty, as other contracts, we give consideration to the intent of the parties so as to carry out their manifest purpose . . . we proceed under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to the rights claimed under it, the latter is preferred. 562 F.Supp. at 236.

Under this rule of construction, the cabin pressure changes proximately causing injury to a passenger constituted an "accident" and the Ninth Circuit properly reversed summary judgment against Ms. Saks.

B. The Convention Should Be Interpreted In Light of Changed Circumstances in International Aviation Since 1929 and Consistent With The United States' Efforts To Expand the Passengers' Right to Compensation.

Courts have recognized the unique circumstances that shaped the Warsaw Convention.

> The Convention was drafted in the late 1920's when the international air transportation industry was in its beginning stages. In order to provide a favorable environment for the industry's growth, various sovereignties agreed to create a uniform body of law governing the rights and responsibilites of passengers and air carriers in international air transportation. [Citations]. The drafters of the treaty proposed to limit liability for injuries caused by air accidents and, as an offset, proposed a presumption of liability on the part of the air carrier. . . .

Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258-1259 (9th cir. 1977), *cert. denied,* 433 U.S. 912 (1977).

In the early days of aviation, the hazards of aviation were considered to be enormous and the rules affording compensation were accordingly quite strict. As recently as 1938, The Restatement of Torts categorized aviation as an ultra-hazardous activity. Restatement of Torts § 520, comment *d,* comment *g* ("Aviation has not as yet become either a common or an essential means of transportation," and airplanes "have not been so perfected as to make them subject to a certainty of control.").

Against this background the Warsaw Convention was adopted by the United States to limit liability for personal injury to $8,300.00 and to deny liability if the airline had taken all "necessary measures to avoid the damage" or such measures were "impossible". Another court has characterized the Warsaw Convention as manifesting "parental concern for the infant industry," *Windbourne v. Eastern Airlines, Inc.,* 479 F.Supp. 1130, 1140 (E.D.N.Y. 1979), *rev'd. on other grounds,* 632 F.2d 219 (2d Cir. 1980).

The *Windbourne* court observed, however, that between 1929 and 1965, the dates of the Warsaw Convention and the Montreal Convention, the aviation industry, "nurtured by industrial advancements in science and technology . . . matured into a comparatively safe, swift and profitable business." 479 F.Supp. at 1140. The Warsaw Convention should therefore be interpreted less restrictively with respect to passenger claims in light of these changes. *Maugnie v. Compagnie Nationale Air France, supra.* International agreements, like "other contracts, . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting," *Rocca v. Thompson,* 223 U.S. 317, 331-332 (1912); see also *Factor v. Laubenheimer,* 290 U.S. 276, 295 (1933).

The enormous increase in airline safety since adoption of the Warsaw Convention is reflected in the fact that during the five-year period 1925 to 1929 in domestic and foreign travel, the fatality rate was 45 per 100,000,000 passenger-miles, whereas in 1965, the rate was 0.55 fatalities per 100,000,000 passenger miles. 1965 Annual Report of the ICAO Council to ICAO Assembly 13.

The radical improvement in conditions in the airline industry and the obsolescence of the goals of the Warsaw Convention were summarized in a staff memorandum

addressed to the Civil Aeronautics Board on March 18, 1980 by the Chief, Policy Development Division:

> The Warsaw Convention was negotiated during the late 1920's, when the aviation industry was in its infancy. The minutes of the negotiations show that the primary concerns of the drafters are no longer of great importance to the industry. . . .
>
> In 1929, air travel was perceived by the public and, more importantly, by insurance companies, to be an extremely risky mode of transportation. A major justification for limiting liability was that, unless carriers could present potential insurers with some degree of predictability in estimating damages from aircraft accidents, they would have great difficulty in obtaining coverage. . . . Over the years, air travel has become one of the safest modes of tranportation, and airlines, even those operating under circumstances where they cannot limit their liability for death or personal injury, have no special difficulty finding insurers.
>
> • • • •
>
> Warsaw has become an anachronism, yet various attempts to amend it have become stalled by the ratification process.

Quoted in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, ____ U.S. ____, 104 S.Ct., 1776, 1794 n.4 (dissent). (1984).

Thus, although the Convention was "drafted with a bias in favor of the air carriers," *Maghsoudi v. Pan American World Airways, Inc.*, 470 F.Supp. 1275, 1278-1279 (D. Ha. 1979), courts no longer need to give effect to a bias in favor of the air carriers because the carriers are no longer in need of such protection. For this reason one District Court recently broadened the definition of the term "damage" to encompass monetary loss as well as physical

damage, even though the French word "avarie," if strictly interpreted, means only physical damage. *Denby v. Seaboard World Airlines, Inc.*, 575 F.Supp. 1134 at 1139-1140 (E.D.N.Y. 1983). The court held that the provision must be interpretated to effectuate its purpose in light of changed conditions:

> Containerization and other new technologies developed in the last 50 years have subjected the air freight industry to drastic changes. These changes require a reading of Article 26 in tune with modern industrial practices and needs. 575 F.Supp. at 1140.

The minimal increased cost of expanding protection under Warsaw in light of modern airline safety is an important factor to be considered in interpreting the terms of the Warsaw Convention. A C.A.B. study shows that an increase in the liability limitation from the Warsaw limit to $100,000.00 would cost about $.96 for a 3,000-mile journey costing approximately $255.00 one-way economy class. The relative insignificance of an increase in insurance premiums is shown from the fact that for the two leading U.S. international air carriers, the cost of insurance is between 0.4% and 0.8% of total operating costs. Raising the limits to $100,000.00 in 1965 would have increased the percentage for the first carrier to 0.7% and for the second carrier to 1.3% of operating costs, which compares favorably, for example, with advertising costs for each carrier of approximately 3.6% of total operating costs. Lowenfeld and Mendelsohn, *op. cit.*, 553-556.

This Court should also consider that domestic carriers have not suffered from the absence of Warsaw restrictions, even though they have been compelled to compensate passengers at approximately seven times the amount required of Warsaw carriers. A C.A.B. study has shown that the average recovery between 1950 and 1964 for a fatality in a Warsaw case was $6,484.00 as compared to

$38,499.00 in a non-Warsaw case. During the most recent period (1958-1964), the average recovery for a fatality on a non-Warsaw case had risen to over $52,000.00. Lowenfeld and Mendelsohn, *op. cit.*, 533-556.

The United States has long recognized that the bias in favor of air carriers in the Warsaw Convention is no longer necessary and for at least 30 years has directed its official efforts to expanding the passengers' right of recovery

The United States expressed its dissatisfaction with the Warsaw limits at the 1953 ICAO Legal Committee meeting in Rio de Janeiro. The United States initially sought a limitation of $25,000.00 and when faced with a heavy majority in favor of a $13,300.00, the United States delegation "banged its fists on the table," talked of possible denunciation, and after a three-day postponement of further voting, proposed a compromise of $16,600.00 which could be increased by 25% for the purpose of awarding reasonable attorney's fees if the carrier, prior to trial, had not made a written offer to settle at an amount at least equal to the judgment. Lowenfeld and Mendelsohn, *op. cit.*, 507.

The United States sought to increase the amount of recovery to $25,000.00 under the Warsaw Convention through the Hague Protocol in 1955. L. Kreindler, 1 Aviation Accident law, 12-2 (1984).

The height of the United States' dissatisfaction with the restrictions placed on passenger recoveries came with the conditional denunciation of the Warsaw Convention unless the limit on recoveries were increased to $75,000. This denunciation led to the Montreal Agreement, which the executive branch of the United States government has interpreted as imposing "absolute liability" for "personal injury," without any requirement of "accident."

The United States' broad interpretation of the Montreal Agreement is apparent from the Civil Aeronautics Board press release approving the Montreal Convention on May 13, 1966, which says nothing about the necessity of a sudden and unusual event in the operation of the aircraft, but only states that the Convention provides up to $75,000.00 of liability for "death or injury to passengers . . . ." C.A.B. Press Release 66-61; 382-6031, May 13, 1966.

The intent of the United States in adopting the Montreal Convention is also made clear in a memorandum of the State Department submitted to the United States Senate characterizing the Montreal Convention as imposing "absolute liability" upon the airline and requiring the claimant only to prove "the amount of his damages." Nowhere does the memorandum speak of a requirement that the claimant also prove that the damage was caused by the sudden and unusual occurrence, the requirement for which Air France contends. Dept. of State Memorandum, "United States Government Action Concerning the Warsaw Convention," May 5, 1966, p. 4. See generally, L. Kreindler, 1 Aviation Accident Law § 12A.07 (1984).

The press releases of the State Department relating to the Montreal Agreement and the Order of the Civil Aeronautics Board approving the Montreal Agreement do not mention the word "accident", but instead embrace the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier. Department of State Press Release Nos. 110, 111, 54 Dep't. State Bull. 955, 956 (1966) ("Airlines in international travel will be absolutely liable up to $75,000.00 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases."); C.A.B. Order No. E-23680, 31 Fed. Reg. 7320 (1966). Nowhere has the United States acknowledged

that a passenger must prove a sudden and unusual occurrence on the part of the aircraft to obtain compensation. In fact, when the United States formally withdrew its notification of termination of adherence to the Warsaw Convention after the Montreal Agreement, the United States' note to the Polish Ministry of Foreign Affairs articulated the United States':

> continuing objectives of uniformity of international law and *adequate protection for international air travelers.* (emphasis added)

Quoted in full in L. Kreindler, *supra,* § 12A.07[3].

The position of the United States Government with respect to recovery by passengers for damages sustained in international air travel has been designed to achieve three basic objectives: "certainty of recovery, speed of recovery, and sufficiency of recovery." R. Boyle, The Guatemala Protocol, 6 Akron Law Review 123, 126 (1973). These were the objectives stated by the chief of the United States delegation at a meeting of the legal committee of the ICAO as a result of the United States' denunciation of the Warsaw Convention. *Id.*

A United States survey of recoveries in non-Warsaw Convention aviation accident cases through 1970 covering both judgments and settlements showed that a full recovery for the great majority of passengers would require a limit on the order of $300,000.00. To permit this additional recovery within the United States, the United States proposed Article 35(A) of the Guatemala Protocol under which any country may provide assistance to supplement the compensation awarded under the Guatemala Protocol. *Id.* at 127. The Brief submitted by the United States is distinctly and inexplicably to the official position of the United States in support of passengers for the past 30 years.

The United States has been the prime mover behind the Montreal Agreement and other efforts to expand Passengers' recovery during the past 30 years. This Court, as a branch of the United States government, should give full consideration to the United States' position in favor of expanded passenger recovery for "personal injury" regardless of "accident," particularly where the interpretation of the ambiguous term "accident" permits a result favorable to the passenger without doing violence to the terms of the Convention, and where the undisputed improvements in airline safety since 1929 have rendered utterly obsolete the historic objective of the Warsaw Convention to nurture international airlines during their infancy. For these reasons the reversal by the Ninth Circuit was proper and should be affirmed.

IV

AIR FRANCE CANNOT INVOKE THE LIMITATION OF "ACCIDENT" BECAUSE THE TICKET ADVICE TO PASSENGERS UNDER THE MONTREAL AGREEMENT DOES NOT LIMIT AIRLINE LIABILITY TO "ACCIDENTS."

Even if this Court determines that Ms. Saks' hearing loss did not result from an "accident," Air France cannot invoke the term "accident" in the Warsaw Convention to avoid liability under the Warsaw Convention because the ticket advice provided to Ms. Saks by Air France fails to state that Air France's liability is limited to "accidents." Federal courts have consistently barred airlines from invoking Warsaw defenses where adequate notice was not provided the passenger in the ticket notice.

The Montreal signatories superceded the Warsaw phraseology for compensable injuries when they agreed to permit compensation for "death . . . or personal injury" however caused, as reflected on the following ticket advice to international passengers:

> For . . . passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention . . . provide[s] that the liability of [the carrier] *for death of or personal injury* to passengers is limited in most cases to proven damages not to exceed U.S. dollars 75,000.00 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier.

Reprinted in Lowenfeld and Mendelsohn, *op. cit.*, p. 598 (emphasis added).

There is nothing in the notice prescribed by the Montreal Agreement to advise the passenger that recovery is prohibited for personal injuries absent a showing of an "accident." Consequently, Ms. Saks could not be aware of the limitation which Air France seeks to invoke and could not have had the opportunity to obtain insurance that would cover injuries from a nonaccident. Therefore the "accident" limitation cannot now bar her claim.

Full and effective notice to the passenger of a defense to liability under the Warsaw Convention is so important that the airline is precluded from invoking the defense where it is not adequately communicated to the passenger. See generally *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C.Cir. 1973). For example, in *Krystal v. British Overseas Airways Corporation*, 403 F.Supp. 1322 (C.D. Cal. 1975), the question was whether the plaintiff could recover for mental distress arising from a hijacking. The court was of the opinion that the effect of the Montreal Agreement was "to permit recovery for mental distress" because the ticket notification of the limits of the Warsaw Convention contained only the words "personal injury." This was different from the Convention's terminology of "wounding . . . or bodily injury." Because the wording of the Warsaw Convention was subject to more than one interpretation, and because

the notice to passengers dictated by the Montreal Agreement did not clearly exclude mental suffering, the District Court permitted the plaintiff to recover for mental injuries. See also *Husserl v. Swissair Transport Co., Ltd.*, 388 F.Supp. 1238, 1250 (S.D.N.Y. 1975) (Husserl II); *Palagonia v. Trans World Airlines, Inc.*, 16 Avi. 18,152 (N.Y.Sup.Ct., Dec, 28, 1978) (emotional distress is compensable because ticket advice refers to "personal injury," superseding Warsaw limitation to "bodily injury.")

The reason for requiring adequate ticket notice as a precondition to the airlines' invocation of Warsaw defenses was explained in *Deutsche Lufthansa Aktiengesellschaft v. C.A.B., supra.* The airline brought suit, contending that the notice required by the C.A.B. conflicted with the Warsaw Convention. In the course of upholding the C.A.B. order, the Court of Appeals observed that the prior cases on the issue of the adequacy of the ticket notice require:

> that passengers be afforded ample opportunity to comprehend the limitations of liability to which they are subjected, and that they be given a chance to purchase alternative, private insurance. Passengers are not to be required to traverse an obstacle course created by the carriers in order to successfully discover the nature of their rights and substance of the carriers' limitations on liability. The passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained. 479 F.2d at 917.

Ms. Saks did not receive "full and effective notice" of the "accident" limitation and therefore could not obtain alternative insurance protection. Consequently Air France should not now be permitted to assert the "accident" requirement as a defense.

In a related context, several courts of appeals have barred Warsaw defenses where the carrier did not precisely comply with the Warsaw ticket delivery requirement. These holdings demonstrate that where, as here, as passenger is not properly advised of Warsaw limitations, those limitations cannot later be invoked to bar the passenger's claim. For example, in *Lisi v. Alitalia-Linee Aeree Italiane, Sp. A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968), suits for wrongful death and personal injuries and property damage were brought arising out of an air crash shortly after takeoff in Ireland. On a pretrial motion regarding the defense of limited liability under the Warsaw Convention, the Court of Appeals ruled under the Warsaw Convention's Article 3(2) and Article 4(4) that the carrier may not enjoy the limitations of liability unless it delivers a ticket to a passenger or a baggage check with respect to baggage. The delivery requirement entailed a requirement that the notice be adequate, and the Court of Appeals found the notice to be inadequate because the text was "in exceedingly small print," 370 F.2d at 513, and therefore could not "reasonably" have given the passengers the required notice. 370 F.2d at 514.

The importance of making the damage limitation to plain to passengers was articulated by the *Lisi* court as follows:

> This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently travelled domestically, the amount they may recover in the event of an accident is drastically reduced. 370 F.2d at 513.

Another court has held that the use of 8.5 point type rather than 10-point print size in advising international passengers of the liability limitations constituted a breach of the Montreal Agreement, thus suspending the liability limitation of $75,000.00 per passenger. *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833 (E.D.N.Y. 1982) aff'd. 705 F.2d 885, (2d Cir.) *cert. denied sub nom. Polskie Linie Lotnicze (LOT Polish Airlines) v. Robles*, ____ U.S. ____, 104 S.Ct. 147 (1983).

In summary, federal courts have carefully scrutinized the adequacy of notice to the passenger regarding the Warsaw limitations. Where notice was inadequate, the airline was barred from invoking the limitation. In the instant case, the notice under the Montreal Agreement stated that Air France would be liable for Ms. Saks' "personal injury." Now Air France denies such liability, based on the term "accident" in the Warsaw Convention, a limitation of which Ms. Saks was given no notice, and consequently against which Ms. Saks could not obtain insurance prior to boarding. Because Air France agreed to liability for "personal injury" under Montreal Convention, it is inequitable to permit Air France now to obtain a greater protection in American courts than it agreed to. Ms. Saks should be permitted to recover for her "personal injuries" without being required also to prove an "accident," a requirement of which she was not given notice.

V

APART FROM THE INTERPRETATION OF THE WARSAW CONVENTION, THE REVERSAL BELOW OF THE SUMMARY JUDGMENT AGAINST MS. SAKS WAS PROPER.

Ms. Saks' complaint was filed in state court alleging state law claims for negligence. These claims embraced the airline's negligent failure to warn Ms. Saks prior to boarding of the risk of hearing loss from changes in cabin pressurization, and the airline's negligence in maintaining a system of cabin pressurization that was dangerous to human hearing even when operating "normally." The motion brought by Air France acknowledged that Ms. Saks might pursue her state law claims despite her inability to recover under the Warsaw Convention by seeking, "in the alternative . . . partial summary judgment." JA 8. The District Court, however, ignored Ms. Saks' state law claims and, without considering or resolving them, ordered summary judgment. This was error. The reversal ordered by the Ninth Circuit was therefore proper and should be affirmed by this Court.*

A passenger's cause of action under the Warsaw Convention is exclusive only if the cause of action under Warsaw exists. If the passenger's claim is outside of Warsaw, as the District Court ruled, then the passenger is permitted to proceed against the airline on state law claims. While Warsaw clearly creates a cause of action in Article 17, stating "the carrier shall be liable for damage

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* Although Ms. Saks did not assert below that the summary judgment was improper for its failure to resolve her state law claims, she is not barred from urging that the Ninth Circuit's decision be affirmed on that ground. A party may "advance any ground, even one . . . not considered below, in support of the judgment in his favor." R. Stern & E. Gressman, Supreme Court Practice 478 (5th ed. 1978), cited with approval in *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982), 102 S.Ct. 2355, 2359 n.5 (1982).

sustained in the event of the death or wounding of a passenger . . .," Article 24 clearly recognizes that carriers may be subject to local law claims by recognizing "any action for damages, however founded. Consequently the Warsaw Convention "has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury." *In re Air Crash In Bali, Indonesia on April 22, 1974,* 648 F.2d 1301, 1311, n.8 (9th Cir. 1982).

Thus the unavailability of a claim under the Warsaw Convention does not support summary judgment against Ms. Saks because the unavailability of a right of action under the Convention "does not necessarily prevent the application of local causes of action outside of the Convention . . . ." *Metz v. KLM Royal Dutch Airlines,* 15 Avi. 17,843 (D. Mass. Nov. 26, 1979); *accord, MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir. 1971) (Warsaw Convention and negligence claim under local law).

Where a District Court issues summary judgment simply because it believes the plaintiff's claim to be barred under the Warsaw Convention, without any consideration of the viability of a local law claim against the airline, such a summary judgment is properly reversed. *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 133-135 (3d Cir. 1984).[9]

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[9] Accord, *Husserl v. Swissair Transport Co.*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Schmidkunz v. Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980) (reaching plaintiff's negligence claim after disposing of her Warsaw Convention claim); *Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (passenger not subject to Warsaw is left "to remedies of local law"), *cert. denied*, 430 U.S. 950 (1977); *Hill v. United Airlines*, 550 F.Supp. 1048, 1054 (D. Kan. 1982); *Felismina v. Trans World Airlines, Inc.*, 13 Avi. 17,145 (S.D.N.Y. 1974) (state law claim survives where Warsaw Convention is inapplicable); *Rullman v. Pan American World Airways, Inc.*, 471 N.Y.S.2d 478 (N.Y. Sup. Ct. 1983) (state law claim survives where claim is not subject to Warsaw

Air France may be liable under state law for negligent failure to warn of the hazard to hearing and for negligent maintenance of a cabin pressurization system harmful to human hearing even when functioning "normally." *American Airlines, Inc. v. Marchant*, 249 F.2d 612 (1st Cir. 1957) (airline duty to mitigate foreseeable injury from mild ear inflammation aggravated by changes in air pressure).

Moreover, changes in cabin pressurization are like air turbulence—foreseeable, inherent in air travel, and capable of inflicting injuries. Therefore with respect to both phenomena airlines may be required under state law to take all reasonable measures exercise due care to reduce or prevent injury. A warning to Ms. Saks would have been one such precautionary measure. *Eastern Air Lines, Inc. v. Sibler* (5th Cir. 1963) 324 F.2d 38 (5th Cir. 1963) (duty to warn of air turbulence; judgment for plaintiff affirmed); *Brittain v. Piedmont Aviation, Inc.*, 120 S.E.2d 72 (N.C. 1961) (duty to warn of air turbulence; judgment for plaintiff affirmed); *Urban v. Frontier Air Lines* (D.C. 1956) (airline permitted plaintiff to leave seat and suffer injury during air turbulence; judgment for plaintiff); *Cudney v. Braniff Airways*, 300 S.W.2d 412 (Mo. 1957) (airline has duty to take precautions against injury from air turbulence); *Small v. Transcontinental & Western Air, Inc.*, 96 Cal.App.2d 408, 216, P.2d 36 (1950) ("downdrafts . . . are not uncommon; . . . prudent operator must take whatever precautions are necessary;" judgment for plaintiff affirmed).

Because the District Court only ruled that Ms. Saks had no claim under the Warsaw Convention but did not consider, let alone resolve, Ms. Saks' state law claims for negligence, the order granting summary judgment

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Convention); *Adamsons v. American Airlines, Inc.*, 433 N.Y.S.2d 366 (N.Y. Sup. Ct. 1980), *aff'd* 449 N.Y.S.2d 487 (1982), (airline refusal to board passenger was not accident; judgment for $500,000 affirmed).

against her was erroneous. The reversal ordered by the Ninth Circuit should therefore be affirmed.

CONCLUSION

The decision of the Ninth Circuit was the result of a careful consideration of the history of the Warsaw Convention and an application of the Convention calculated to maintain its continued vitality in the modern air age.

Although the Warsaw Convention long ago served its purpose, the Court is not being asked to reject the Convention. Rather, this Court is being asked to affirm a determination that the sudden, unexpected and painful injury suffered by Ms. Saks due to the inherent operation of the aircraft and through no fault of her own constitutes a compensable injury within the terms of the Warsaw Convention as modified by the Montreal Agreement. The Ninth Circuit's determination is well-supported, not only by the policies underlying the Convention, but also by the definition of "accident" promulgated by ICAO, the reigning organization governing international aviation, and thereafter adopted by the National Transportation Safety Board.

The Ninth Circuit's decision rejected Air France's rationale, which would permit recovery for an injury, however slight, caused by the usual and common phenomenon of a "bumpy" flight, but would deny recovery to Ms. Saks for a severe injury uniquely-related to air travel.

If Air France succeeds in this Court, claims like Ms. Saks' will be placed outside the Warsaw system and its ceiling on recovery. Moreover, a reversal of the decision below would achieve the anomalous result of cherishing cargo above human beings, an absurdity for which there is absolutely no support in the history of the Warsaw Convention or its application over the past 55 years.

The Ninth Circuit's decision should therefore be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 83-1785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AIR FRANCE,
Petitioner,

VS.

VALERIE HERMIEN SAKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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No. 83-1785

In the Supreme Court

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OCTOBER TERM, 1984

AIR FRANCE,
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VS.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

The decision below amends article 17 of the Warsaw Convention by judicial fiat to achieve a result similar to a protocol recently submitted to the Senate and rejected by it. The district court properly limited itself to the language of the present treaty and found that respondent's injury had not been caused by an accident. Its judgment should be reinstated.

The decision below misreads the Convention and the Montreal Agreement and relies upon a definition of "accident" unrelated to article 17. Respondent's attempt to defend the Ninth Circuit's decision, like the decision itself, rests primarily upon appeals to social policy. These alleged policy concerns are not founded in the language of the Convention or its history. Such arguments should be addressed to the political branches, who alone have the power to denounce or amend treaties.

Respondent is silent on critical matters raised by petitioner. Respondent fails to address the 1971 deliberations of the Treaty parties at Guatemala City which confirm the significance of the term "accident" as a prerequisite for liability under the Convention. Although respondent purports to explain to the Court the position of the United States and the intent of the Treaty parties, she ignores the views expressed to the Court by the United States and the Republic of France. In particular, respondent persists in maintaining that the Montreal Agreement modifies the Warsaw Convention to create liability for all risks inherent in air travel notwithstanding the statements of the United States, France, and IATA, all of whom were present at Montreal, that this is not the Montreal Agreement's purpose, intent or effect.

Respondent also urges matters not of record and asks the Court to address abstract or hypothetical questions. Respondent conceded in the trial court the only negligence claim pled by the complaint. No other claims appear in the record below. She should not now, in the guise of protecting the "integrity" of the Convention, be permitted to raise issues concerning the Convention's preemption of state law. Similarly, no challenge was presented below to the adequacy of the Warsaw notice printed on respondent's ticket. Disposition of these issues is unnecessary to decide this case.

I

RESPONDENT'S INJURY WAS NOT CAUSED BY AN ACCIDENT; RESPONDENT IGNORES THE CONSTRUCTION GIVEN ARTICLE 17 BY THE PARTIES TO THE CONVENTION

There is no significant dispute that recovery under article 17 requires that the injury must have been caused by an accident.

Respondent's convoluted efforts to avoid this simple requirement fail to address the construction of the term "accident" acknowledged by the Treaty parties at Guatemala City in 1971. She instead touts a definition of accident found in the National Transportation Safety Board's regulations as "[t]he only definition of 'accident' in the international aviation community."[1] Respondent urges that this definition has been "adopted" by the United States, ignoring the statement made by the Solicitor General to this Court that the definition contained in the Safety Board's regulations "has no discernible bearing on what meaning the framers of the Warsaw Convention intended for the term."[2]

The meaning of the term "accident" lies in its use in the Convention and by the Treaty parties. The delegates at Guatemala City understood "accident" to mean an abnormal event or unexpected happening, and not simply an event or occurrence.[3] Until the decision below, the courts had uniformly given the term a similar meaning.[4] The Court "may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories." *Trans World Airlines v. Franklin Mint Corp.*, — U.S. —, 80 L. Ed. 2d 273, 286 (1984).

The "occurrence" definition which respondent advocates is derived from an annex to the Chicago Convention,[5] the basic charter of the International Civil Aviation Organization ("ICAO").[6] The ICAO has, however, indicated both

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[1] Brief for Respondent at 8-9.

[2] Brief for the United States at 13.

[3] *See* Brief for Petitioner Air France at 12-14; Brief for the United States at 21-24; Brief for the Republic of France at 20-22.

[4] *See* Brief for Petitioner Air France at 20, 22-23.

[5] Convention on International Civil Aviation, *done* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

[6] This annex, Annex 13, and the regulation implementing it, 49 C.F.R. § 830.2, each give an extremely broad definition of "accident" in order to ensure that the all possible data relating to

explicitly and through its actions that this definition has no relevance to the Warsaw system of liability. Significantly, at the Guatemala City meetings (which were held under ICAO auspices), there was no suggestion that the Annex 13 definition had any relevance to article 17. The United States and France, who are effectively permanent members of the ICAO Council,[7] have appeared before the Court and oppose use of the Annex 13 definition in the Warsaw context. Further, the ICAO has stated that the Annex 13 definition should be "applied only to the use of the term within the Annex."[8]

Respondent further suggests that "accident" means any event that is unusual or unexpected from the standpoint of the injured passenger. Because heart attacks in flight are no more "expected" by passengers than air crash disasters, to adopt the position respondent urges would be to find an "accident" from the fact of an injury and to impose liability simply upon the basis of causation. Article 17, however, requires an accident which *causes* the injury. Respondent's interpretation of article 17 would make the term "accident" meaningless or superfluous.[9]

The decisions which respondent cites for her subjective approach to article 17's accident requirement do not support it and have little relevance to the issues before this

aviation incidents are collected and available for statistical analysis. The implementing regulations require that the operator give notification of each "accident" and that the NTSB report it, §§ 830.5(a), 830.15, 801.35, but the Director of the Bureau of Accident Investigation of the NTSB has broad discretion to determine which such incidents merit investigation. *See* § 831.3.

[7]*See* article 50(b) of the Chicago Convention, and 1 Shawcross & Beaumont, *Air Law* II(5) at II/7 n.5 (4th ed. 1984).

[8]International Civil Aviation Organization, *Accident Investigation and Prevention Divisional Meeting, Montreal 3-24 June, 1974, Report* 8-1 (Doc. 9106, AIG) (1974).

[9]For further discussion of this point, see Brief for the United States at 12.

Court. Insofar as this authority bears on this case at all, it actually supports petitioner's construction of the term "accident".

Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283 (D. Md. 1983), involved a drunken passenger falling on and injuring another. The court noted the *DeMarines* definition of "accident" as "an unexpected and sudden event" and found that this definition had been met.[10] *Oliver*, like the terrorist cases, stands at most for the proposition that article 17 applies where the cause of the injury might arguably be characterized as intentional. The present case and *DeMarines*, however, do not involve the distinction between intentional and unintentional acts, but rather the more fundamental distinction between *normal* and *accidental* causes.

Landress v. Phoenix Life Insurance Co., 291 U.S. 491 (1934), turns on this distinction. Although a death from sunstroke might appear "accidental" to those left behind, it is generally not held to be caused by external, accidental means. *Id.* at 497. Hence, recovery on accident insurance policies was denied. If *Landress* has any relevance here at all, it is because it draws a distinction between accidental injury and injury which is caused by an accident. This is similar to the distinction drawn by article 17.

II

RESPONDENT URGES THE COURT TO SUBSTITUTE ITS POLICY JUDGMENTS FOR THOSE OF THE POLITICAL BRANCHES

Respondent's plea for an all-encompassing definition of "accident" which would radically modify the treaty is based

[10]17 Av. Cas. (CCH) at 18,285 n.6, quoting from the opinion of the district court in DeMarines v. KLM Royal Dutch Airlines, 433 F. Supp. 1047, 1052 (E.D. Pa. 1977), *rev'd on other grounds*, 580 F.2d 1193 (3d Cir. 1978).

upon repetitious policy arguments concerning accident cost allocation and relative insurance costs.[11] These arguments should be addressed to the political branches not the courts. They are particularly inappropriate here because a modification to article 17's language which would produce the result respondent seeks is the subject of a treaty amendment recently rejected by the Senate.[12] This proposal remains on the Senate calendar for reconsideration.[13]

In asking the Court to redefine "accident" as "occurrence," respondent draws her policy arguments primarily from dicta in cases from the Second Circuit. This dicta should be disregarded here or disapproved.[14] No prior decision has held carriers liable under the Convention for

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[11]*See* Brief for Respondent at 20-21, 26-29.

[12]129 Cong. Rec. S2279 (Daily ed. March 8, 1983).

[13]*Id. See* Brief for the United States at 4 n.6.

[14]This dicta comes from decisions holding article 17 applicable to injuries caused by terrorist attacks and was also relied upon by the decision below. *See* Pet. App. 7a-9a, 724 F.2d at 1386-87. These decisions speak loosely of "absolute liability" for "all the hazards of air travel", but this language is unsupported by authority and is unnecessary to those cases' results.

In Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), the only question that the Second Circuit was called upon to decide was whether passengers who were attacked by terrorists as they stood in line at the departure gate were "in the course of any of the operations of embarking" as that phrase is used in article 17. Having reviewed all the steps that had been taken in the boarding process, the court said it was "driven" to conclude that the plaintiffs were "in the course of embarking". *Id.* at 33-34. The court then proceeded into dicta inappropriate to treaty construction, saying: "Moreover, a relatively broad construction of article 17 . . . is in harmony with modern theories of accident cost allocation". *Id.* at 34. The same terrorist

all risks inherent in air travel."[15] Rather, the decision below is a radical departure from previous authority. Even those cases on which respondent would rely have held the occurrence of an accident to be an independent prerequisite for liability under the Convention."[16]

Respondent also claims that the Montreal Agreement marked the adoption of a new system of liability based upon cost allocation and "absolute liability", again relying upon dicta from the same Second Circuit cases. Petitioner's opening brief explains in detail why the Montreal Agreement did not and could not have such consequences."[17]

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attack and "embarking" issues were addressed in Evangelinos v. Trans World Airlines, 550 F.2d 152 (3d Cir. 1977). The same holding was reached without such dicta.

In Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973), the court found that the parties to the Convention intended to include terrorist acts within the meaning of "accident" on the basis of the subsequent actions of the parties and specific discussions of the issue. *Id.* at 707. The district judge then stated in dicta that his conclusion was supported by the "policy underpinnings of the Warsaw Convention", pronouncing without reference to authority on its supposed risk allocation policy. *Id.*

[15]Respondent improperly implies that Philios v. Transcontinental & Western Air, Inc. 1951 N.Y.L.J. 2357, 1953 U.S. Av. 479 (N.Y. City Ct. 1951), and Rullman v. Pan American World Airways, 122 Misc. 2d 445, 471 N.Y.S. 2d 478 (N.Y. Sup. Ct. 1983) are "decisions that impose liability for risks inherent in air travel". Brief for Respondent at 10. *Philios* held a carrier could not overcome the Convention's presumption of negligence where a non-pressurized aircraft was used for one leg of an international flight, and the pilot may have descended too rapidly, contrary to regulations. *Rullman* did not impose liability under the Convention at all. It held that a fall on a jetway connecting the terminal and the aircraft was not an accident, and, moreover, did not occur in the course of embarking or disembarking. 471 N.Y.S. 2d at 479, 481.

[16]*See Evangelinos*, 550 F.2d at 154; *Day*, 528 F.2d at 33; *Husserl*, 351 F. Supp. at 706.

[17]Brief for Petitioner Air France at 16-19.

The Brief for the United States is in accord and states that the Montreal Agreement was not intended to create a system of no-fault liability for every injury suffered during an international flight.[18] The views of the two departments of the executive branch responsible for Warsaw matters have been presented to the Court:

> In preparing this brief, the Solicitor General consulted with the Departments of State and Transportation, the two executive departments that represent the interests of the United States in negotiations involving the Warsaw Convention. These departments have informed us that the court of appeals misconstrued the intent of the United States government in helping to develop the Montreal Agreement; the government's objective was not to bring about a health insurance system whereby carriers would be liable for every injury caused by routine aircraft operations, but rather simply to obtain higher limits of carrier liability with a minimum of litigation (by requiring waiver of the due care defense). In particular, it was not the intent of our representatives to alter the Warsaw Convention requirement of an "accident", which means an unusual or unexpected event that caused the injury.[19]

Respondent's only response to these statements by the United States is to ignore them.

Respondent also details at great length changes in the circumstances surrounding the aviation industry since 1929 in arguing for expansion of carrier liability under the Treaty. Yet, as this Court recognized last term in addressing the Convention's liability ceiling, a private party may not invoke "changed circumstances" to avoid enforcement of the Treaty's language. *Trans World Airlines v. Franklin Mint Corp.*, 80 L. Ed. 2d at 282.

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[18] Brief for the United States at 9-10.

[19] Brief for the United States at 18-19 (footnotes omitted).

United States efforts to raise the Convention's liability ceiling are likewise irrelevant to the narrow issue presented by this case. This should be evident from the support given by the United States in this Court for petitioner's position. Construction of article 17 does not concern or affect the liability ceiling. More fundamentally, whatever modifications to the Convention the executive branch may propose or support, the Convention as presently ratified remains the law of the land until either it is denounced by the political branches or amended by the parties with the adherence of the United States. Neither has occurred.

Respondent asks this Court to make a radical reinterpretation of the liability language of the Convention on the basis of vague and abstract policy considerations, but offers no coherent account of the policies which she purports to find in the Convention. Sometimes she claims that the Convention represents an equitable distribution of risks between carriers and passengers,[20] and elsewhere claims that it was "a mutual aid pact between international airlines and their governments".[21] In fact, the Convention was a compromise, adopting a system of liability based on fault and not on the allocation of risks, in which the passenger gained the benefit of a presumption of negligence in return for a ceiling on carrier liability.[22] Neither the Convention nor the Montreal Agreement created a no-fault system of passenger insurance.[23]

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[20] *See* Brief for Respondent at 13, 18.

[21] Brief for Respondent at 33.

[22] *See Minutes Second International Conference on Private Aeronautical Law, Warsaw, October 4-12, 1929* 252 (R. Horner & D. Legrez trans. 1975) (hereinafter "Warsaw Minutes"); Brief for Petitioner Air France at 16 n.32.

[23] *See* Brief for the United States at 16-17.

III

RESPONDENT'S CONSTRUCTION OF ARTICLE 17 IS INCONSISTENT WITH THE LANGUAGE OF THE CONVENTION AND IS NOT SUPPORTED BY THE HISTORY SHE SELECTS

Respondent claims the term "accident" is not the "operative" term for liability under the Convention and argues that the distinction between "accident" and "occurrence" in articles 17 and 18 of the Convention is not significant.[26] Neither the language of the Convention itself nor the history which respondent cites supports her conclusions. A correct construction of the treaty gives effect to each word and each provision. "Accident", "caused", and "damages", are each significant terms in defining the carrier's duty to the passenger.

Respondent argues that the use of the term "accident" in article 17 is not significant because the word does not appear in other articles of the Convention.[27] This is a non-sequitur. Under principles of treaty interpretation, use of the term "accident" in article 17, instead of the more inclusive term "occurrence" or "event" used elsewhere,[28] indicates that the term "accident" should be given a different and narrower construction. *See Factor v. Laubenheimer*, 290 U.S. 276 (1933). If, as respondent contends, "damage" was the "operative" term, presumably the draftsmen would have rewritten article 17 to state that the carrier

[26]Brief for Respondent at 22.

[27]Brief for Respondent at 22-25.

[28]The translation used in the United States and reprinted at Pet. App. 20a has "occurrence" in article 18. The translation used by the editors of the Warsaw Minutes has "event". Warsaw Minutes 206. The official French text has "evenement". The distinction between "accident" ("l'accident") and "event" or "occurrence" ("l'evenement") is important and in the official text, whereas the choice between "event" and "occurrence" is a matter of translation.

"shall be liable . . . if the . . . damage . . . took place on board the aircraft. . . ." There would be no need to mention "the accident which caused" the damage.

Respondent's partial examination of the drafting history offers no support for her contention that article 17's use of the term "accident" should be ignored. As respondent notes, the delegates at Warsaw began with a draft which combined provisions for injury to passengers and damage to baggage or goods in a single article. However, this approach was unacceptable to the delegates, and articles 17 and 18 as adopted differed from the draft article in two very significant ways: (1) the period during which liability for passenger injuries attaches is different from that for damage to goods or baggage, and (2) liability in the case of passenger injuries is restricted to injuries caused by an *accident*, whereas there is liability for damages to goods or baggage in the case of every *occurrence*. If, as respondent seems to contend, the draftsmen had wished only to accomplish the first of these changes, the term "occurrence" would have been employed in both articles.

Respondent acknowledges that "accident" does not mean the same as "occurrence".[27] Her speculation as to why the broader term "occurrence" was employed in article 18 does not explain its deliberate omission from article 17.

Comments of the president of the drafting committee, not cited by respondent, indicate that a principal object of redrafting the Convention's liability provisions as sep-

[27]*See* Brief for Respondent at 25. The Dutch author to whom she refers elsewhere in her brief recognizes this as well: "It should be pointed out that in the first paragraph of Article 18, dealing with the carriage of goods, the expression '*occurrence* which caused the damage' is used. The word 'occurrence' has evidently a wider meaning than the word *accident* used in Article 17." D. Goedhuis, *National Airlegislations and the Warsaw Convention* 201 (1937) (emphasis in original); *see* Brief for Respondent at 14.

arate articles was to set out in each case the causes for which there would be liability:

> [G]iven that there are entirely different liability cases: death or wounding, disappearance of goods, delay, we have deemed that it would be better to begin by setting out the causes of liability for persons, then for goods and baggage, and finally liability in the case of delay.[28]

Respondent goes on to argue purportedly on the basis of her account of the Convention's history, that enforcing the well-established rule that an accident is an independent prerequisite for liability under article 17[29] frustrates the purpose of the Convention by increasing the expense and uncertainty of litigation.[30] While the Warsaw signators did indeed adopt measures to facilitate the resolution of injured passengers' claims, most notably by shifting the burden of proof, the liability system which they established was fault-based and not a system of compulsory flight insurance.[31] The partial history which respondent cites demon-

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[28]*Warsaw Minutes* 205 (comments of Mr. Giannini before the votes adopting articles 17, 18 and 19).

[29]*See, e.g.*, MacDonald v. Air Canada, 439 F.2d 1402, 1404 (1st Cir. 1971); Husserl v. Swiss Air Transport Co., 351 F. Supp. at 706.

[30]Brief for Respondent at 12-14. Respondent claims also that any definition of accident which would result in the denial of any passenger's claim would mean that such claim was "not subject to Warsaw" or its liability limits, thereby creating uncertainty for insurers. Brief for Respondent at 12. This argument rests on a confusion between the scope of the Convention's application and the conditions for liability thereunder. Moreover, it is an attempt to introduce hypothetical state law claims not present in the record of the case. *See* discussion at 14-17, *infra*.

[31]The letter from Secretary of State Cordell Hull, which respondent cites for the proposition that a purpose of the Warsaw Convention is to lessen litigation, is consistent with, and supportive of, petitioner's construction of the treaty. In a passage not quoted by respondent, the Secretary explained that the Convention would modify the traditional negligence system of liability by "placing the burden on the carrier to show lack of negligence" in the case of air accidents. Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 4 (1934), *quoted in* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500 (1967).

[32]Respondent inaccurately asserts that the proceedings of the Warsaw Convention show support among certain delegates for a scheme of absolute liability, citing to the remarks of Mr. Flandin, head of the French delegation. *See* Brief for Respondent at 13-14. Mr. Flandin actually argued for further restrictions on carrier liability. Rather than promoting absolute liability, he was commending French domestic law which then provided "virtually complete exoneration of the air carrier". Warsaw Minutes at 40.

strates nothing to the contrary and bears little relevance to the issues before the Court.[32]

Respondent's appeals to what she describes as the purposes of the Convention are simply another request that the Court dispense with the language of the treaty on policy grounds. As the Court has long recognized, this it may not do:

> We are not at liberty to dispense with any of the conditions or requirements of the treaty, or take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals. [The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 72-73 (1821).]

IV

RESPONDENT URGES NEW MATTERS NOT APPEARING IN THE RECORD AND ASKS THE COURT TO DECIDE HYPOTHETICAL QUESTIONS

A. Whether State Law Claims Survive Dismissal of a Warsaw-Based Cause of Action Is Not an Issue in This Case

Respondent asks the Court to affirm the decision below on the basis of state law claims never presented to the trial court and nowhere found in the record. These matters should not be considered or addressed by the Court.[33] Respondent similarly asks the Court, in the guise of concern for the "integrity" of the Warsaw system, to render an advisory opinion on whether state law claims survive dismissal of a Warsaw-based cause of action. The resolution of this abstract and hypothetical question must await an actual case or controversy.

Respondent conceded in the trial court the only negligence claim that she made. The sole liability allegation of the complaint was that defendant negligently "cause[d]

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[33]It is the Court's general rule not to "consider[s] questions urged by a petitioner or appellant not pressed or passed upon in the courts below." McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940); *see* Berkemer v. McCarty, — U.S. —, 82 L. Ed. 2d 317, 337 (1984); Hoover v. Ronwin, — U.S. —, 80 L. Ed. 590, 603 n.25 (1984). An exception to this rule may apply where matters are plainly raised in the complaint, acknowledged by the courts below, and all factual findings necessary to their resolution are in the record. *See* Capital Cities Cable v. Crisp, — U.S. —, 81 L. Ed. 2d 580, 588 (1984).

Respondent's claim that she may argue any ground in support of the judgment, even one not considered nor pursued below, misstates the law. The case which she cites (which concerns the necessity for a cross-petition) states only that a respondent "may rely upon any matter *appearing in the record* in support of the judgment below." Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982); *see* Langnes v. Green, 282 U.S. 531, 539 (1931). Moreover, in *Blum*, the issue being raised by the appellee had been decided by both courts below.

the cabin pressure to change drastically thereby causing the plaintiff to receive severe pressure to her left ear." JA 2. Nowhere does the complaint allege negligent failure to warn or any other basis for liability.[34]

When petitioner moved for summary judgment, respondent admitted that she had no evidence of malfunction in the aircraft's cabin pressurization system nor evidence of any unusual event occurring on board the aircraft to account for her alleged permanent hearing loss.[35] No other claims of negligence or fault were asserted.[36] Respondent opposed the motion for summary judgment only on the ground that she had a viable cause of action under the Warsaw system, asserting that she had suffered an accident within the meaning of the Convention. She said: "The sole question of law presented to this court by the parties is whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an accident within the meaning of Article 17 of the Warsaw

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[34]Similarly, the other unusual liability theory which respondent now mentions, negligent maintenance of a normal cabin pressurization system, does not appear in the complaint and was not mentioned to either court below. American Airlines v. Marchant, 249 F.2d 612 (1st Cir. 1957) does not concern such a theory and is inapposite. In *Marchant*, the court held simply that a triable issue of fact existed concerning negligence in the pressurization system's operation following a passenger's complaint during the flight. Here respondent admittedly has no evidence of such negligence.

[35]Air France produced evidence that the flight was normal in all relevant respects. *See* JA 17-28. Respondent then conceded that "discovery to date has not disclosed any malfunction or misoperation of any aircraft system or component, most particularly including the cabin pressurization system." JA 29. Respondent did not submit a declaration that she was unable to present facts essential to her opposition, as permitted by Rule 56(f) of the Federal Rules of Civil Procedure, or otherwise ask for the opportunity to conduct further discovery.

[36]*See* JA 29-44.

Convention, as modified by the Montreal Agreement." JA 30.

Respondent at no time presented to the courts below, her new claim that carriers must give passengers special warnings concerning the "hazard" to hearing of normal flight." Respondent's assertion that the district court erroneously ignored state law claims, neither pled nor pursued, is groundless. Having conceded that her negligence claim could not be proven, the sole issue pursued by respondent was whether the Warsaw Convention nevertheless gave her a cause of action. Respondent may not now raise other matters not of record.

"This Court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945)." The hypothetical question which respondent raises as concern for the "integrity" of the Warsaw system is in fact an attempt to subvert it by creating a new class of Warsaw claims. Where, as here, the plaintiff

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"*See* Brief for Respondent at 48. Respondent purports to find a legal basis for this theory in cases holding carriers liable for injuries caused by clear air turbulence. There is however no analogy. "Clear air turbulence" is a specific weather condition affecting aircraft safety. Contrary to respondent's claim that such turbulence is "inherent in air travel", FAA regulations impose specific obligations directed toward avoidance of such turbulent conditions. *See* 14 C.F.R. §§ 121.101(d), 121.419(a)(2)(vi), 121.602, 135.345(b)(6) (1984). The state law cases which respondent cites all involve allegations of carrier negligence in failing to anticipate or avoid air turbulence. They have no bearing on respondent's claim that normal and necessary flight conditions should create liability.

"*See also* Larson v. Valente, 456 U.S. 228, 284 (1982) (Rehnquist, J. dissenting); Coffman v. Breeze Corporations, Inc., 323 U.S. 316, 323-24 (1945); General Talking Pictures Corp. v. Western Electric Co., 305 U.S. 124, 125 (1938) (refusing to answer questions based on factual allegations not supported by record).

concedes that the aircraft functioned normally and the trial court finds that no accident occurred," to suggest that some triable issue of fact remains is indeed to engage in pure hypothesizing.

In any event, respondent is wrong on the merits of the hypothetical question she would raise. The Convention creates a cause of action for injuries occurring during international transportation, from embarkation to disembarkation, and its liability conditions and limits preempt state law." Respondent's argument that potential state law claims could be revived by a finding of no accident, confuses the scope of the Convention's application with the conditions for liability thereunder."

"The extent to which the Convention's liability provisions preempt state law in the context of an injury occurring on board an aircraft is a question which has been presented to the Court in a petition not yet ruled upon. *See* Japan Airlines Co. v. Abramson, 739 F.2d 130 (3d Cir. 1984), *petition filed*, — U.S.L.W. — (U.S. Dec. 12, 1984). That case provides the Court, if it wishes, with an opportunity to resolve the preemption issue in an actual case or controversy on the basis of a fully developed record.

"Article 24, Pet. App. 22a-23a; Boehringer-Mannheim Diagnostics v. Pan American World Airways, 737 F.2d 456, 458 (5th Cir.), *appeal docketed*, No. 84-807, 53 U.S.L.W. 3419 (U.S. Nov. 16, 1984); In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 415, 418 (9th Cir. 1983); Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). During the Warsaw deliberations, the delegate from Great Britain explained that article 24 "touches the very substance of the Convention, because [it] excludes recourse to common law." Warsaw Minutes 213 (remarks of Sir Alfred Dennis).

"Day v. Trans World Airlines, on which respondent relies heavily, concerned the question of whether injuries occurred in the course of embarking. A finding that they were not might have permitted the passengers to employ state law remedies. It would have been a finding that the injuries did not occur as part of international transportation and that the Convention did not apply at all. This would not be the result, however, where an injury occurs during a flight subject to the Convention.

B. Special Notice of Limited Liability Is Also Not an Issue in This Case

Respondent also now claims for the first time that Air France may not assert its rights under the Convention arguing that the form of special notice of limited liability specified by the Montreal Agreement, and approved by the CAB, does not advise the passenger of the conditions for liability imposed by article 17.[42] Respondent does not dispute that she received the notice required by the Montreal Agreement and federal regulations.[43] Thus the notice cases respondent cites have no relevance to her claim. Rather, *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 917-18 (D.C. Cir. 1973), confirms that the required notice is consistent with the Convention. None of these cases questions the adequacy of the notice regulations or requires carriers to print verbatim any specific provision of the Convention. Moreover, this claim was not presented to either court below. Hence, like the respondent's new state law negligence claims addressed above, respondent's notice arguments are not properly before the Court.

Nearly all of the other cases which respondent cites for the proposition that local law claims may survive dismissal of a Warsaw cause of action involve, like *Day*, injuries to passengers which occurred in terminal areas and thus raise the jurisdictional question of whether the injury was in the course of transportation to which the Convention applies. *See* Schmidkunz v. Scandinavian Airlines System, 628 F.2d 1205 (9th Cir. 1980); Martinez Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977); Felismina v. Trans World Airlines, 13 Avi. Cas. (CCH) 17,145 (S.D.N.Y. 1974); Rullman v. Pan American World Airways. The other cases concern claims of carrier misconduct in the booking or routing of passengers. *See* Hill v. United Airlines, 550 F. Supp. 1048, 1054 (D. Kan. 1982); Adamsons v. American Airlines, 105 Misc. 2d 787, 433 N.Y.S. 2d 366 (N.Y. Sup. Ct. 1980), *aff'd*, 87 App. Div. 2d 785, 449 N.Y.S. 2d 487 (1982), *rev'd*, 58 N.Y. 2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21, *cert. denied*, — U.S. —, 77 L. Ed. 2d 1390 (1983). The Convention contains no express provisions concerning liability in such situations.

[42]Brief for Respondent at 41-45.

[43]*See* 14 C.F.R. § 221.175 (prescribing form of notice).

CONCLUSION

The decision below should be reversed and the judgment of the trial court reinstated because respondent's injury was not caused by an accident.

Respectfully submitted,

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